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2985

No. 15295

**United States
Court of Appeals**
for the Ninth Circuit

PAUL MITCHELL,

Appellant,

VS.

C. L. SNIPES,

Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
Third Division**

FILED
DEC - 3 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

McLAUGHLIN & ATKINSON,
First National Bank Building,
Anchorage, Alaska,

Attorneys for Appellees.

BELL, SANDERS & TALLMAN,
Central Building, P. O. Box 1599,
Anchorage, Alaska,

Attorneys for Appellant.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. For the sum of \$142.88, together with interest at 6% thereon from October 15, 1955.
2. For plaintiff's costs and disbursements in this action, including statutory attorneys fees.

McLAUGHLIN & ATKINSON,
Attorneys for Plaintiff, First National Bank Building,
Anchorage, Alaska.

By /s/ KENNETH R. ATKINSON.

[Endorsed]: Filed April 27, 1956.

In the Justice's Court for the Territory of Alaska,
Anchorage Precinct

No. 9-277C

C. L. SNIPES,

Plaintiff,

vs.

PAUL MITCHELL,

Defendant.

JUDGMENT

This matter having come on for hearing on the 17th day of May, 1956, and on the 21st day of May, 1956, plaintiff appearing by and with counsel, Kenneth R. Atkinson, and the defendant appearing without counsel, and the plaintiff having offered

evidence in support of his complaint, and the defendant having offered no evidence,

It is the judgment of this court that the plaintiff have and recover of the defendant the sum of One Hundred Forty-two Dollars and Eighty-eight Cents (\$142.88), together with interest thereon at six per cent (6%) per annum from October 15, 1955, in the sum of \$5.00, court costs in the amount of \$15.00, statutory attorneys fees in the amount of \$22.00, marshal's fees in the amount of \$8.80; all for a total judgment of \$193.68; the same to bear interest at 6% from the date hereof.

It is further ordered that the sum of \$47.06 heretofore attached in this action be paid to plaintiff in partial satisfaction of this judgment, and that plaintiff's bond be exonerated.

Dated this 21st day of May, 1956, at Anchorage, Alaska.

[Seal] /s/ DAVID R. DAINES,
Deputy U. S. Commissioner, Ex Officio Justice of
the Peace.

[Endorsed]: Filed May 21, 1956.

In the Justice's Court for the Territory of Alaska,
Third Division, Anchorage Precinct

[Title of Cause.]

NOTICE OF APPEAL

To: C. L. Snipes, Plaintiff Above Named, and to
Kenneth R. Atkinson, Plaintiff's Attorney.

Notice Is Hereby Given that the defendant, Paul Mitchell, in the above-entitled action, hereby appeals to the District Court for the Territory of Alaska, Third Judicial Division, at Anchorage, Alaska, from that certain judgment entered in the above-entitled action on the 21st day of May, 1956, wherein the above-entitled Court returned judgment for the plaintiff in the sum of \$142.88 and interest in the amount of \$5.00, for plaintiff's court costs in the sum of \$15.00, for plaintiff's marshal's fees in the sum of \$8.80 and for an attorney's fee in the sum of \$22.00, for a total judgment against the defendant in the sum of \$193.68.

Defendant appeals from all and the whole of said judgment.

Dated at Anchorage, Alaska, this 26th day of May, 1956.

BELL, SANDERS &
TALLMAN,

By /s/ JAMES K. TALLMAN,
Of Attorneys for the
Defendant.

Service of Copy acknowledged.

[Endorsed]: Filed May 25, 1956.

In the District Court for the District of Alaska,
Third Division

Cause No. A-12, 275

C. L. SNIPES,

Plaintiff-Respondent,

vs.

PAUL MITCHELL,

Defendant-Appellant.

MOTION TO DISMISS APPEAL

Plaintiff-respondent moves the court for an order dismissing defendant-appellant's appeal.

This motion is based upon the records and file herein, and on the attached memorandum brief.

/s/ KENNETH R. ATKINSON,
Attorney for Plaintiff-Respondent, First National
Bank Building, Anchorage, Alaska.

NOTICE OF MOTION

Please take notice that the undersigned will place the above motion on the motion calendar for June 22, 1956, at 10:00 a.m., or as soon thereafter as counsel can be heard.

/s/ KENNETH R. ATKINSON,
Attorney for Plaintiff-Respondent, First National
Bank Building, Anchorage, Alaska.

Service of Copy acknowledged.

[Endorsed]. Filed June 15, 1956.

[Title of District Court and Cause.]

M. O. GRANTING MOTION TO
DISMISS APPEAL

Now at this time, this cause coming on to be heard before the Honorable Ben C. Connally, District Judge, the following proceedings were had, to wit:

M. O. granting motion to dismiss Appeal entered.
Attorneys notified.

Entered June 22, 1956.

[Title of District Court and Cause.]

ORDER DISMISSING APPEAL

This matter having come on for hearing on the 22nd day of June, 1956, at a regular motion calendar, plaintiff appearing by his attorney, Kenneth R. Atkinson, and defendant appearing by his attorney, James K. Tallman, and the court having heard the arguments of respective counsel, and being fully advised in the premises;

It Is Hereby Ordered and Adjudged that the above-entitled appeal be dismissed.

It Is Further Ordered that the judgment of the justice court on file herein, plus plaintiff's costs in this court on appeal, be entered as the judgment of this court pursuant to Section 68-9-12 ACLA 1949,

and Rules 5 and 25 of the Uniform Rules of the District Court.

Done this 25 day of June, 1956, at Anchorage, Alaska.

/s/ BEN C. CONNALLY,
United States District Judge.

Approved as to form:

/s/ JAMES K. TALLMAN,
Atty. for Defendant.

[Endorsed]: Filed and entered June 25, 1956.

—

In the District Court for the District of Alaska,
Third Division

Cause No. A-12,275

C. L. SNIPES,
Plaintiff-Respondent,
vs.

PAUL MITCHELL,
Defendant-Appellant.

JUDGMENT

This matter having come on for hearing on the 22nd day of June, 1956, and the court having heretofore made and entered its order dismissing this appeal and ordering the judgment of the justice court, plus the amount of plaintiff's costs in this court, to be entered as the judgment of this court;

Now, Therefore, It Is Adjudged, that the plaintiff, C. L. Snipes, have and recover of Paul Mitchell and Fireman's Fund Indemnity Company, his surety, on appeal, jointly and severally, the sum of One Hundred Ninety-three Dollars and Sixty-eight Cents (\$193.68) as the principal sum, and a further sum of Forty-eight and 42/100 Dollars (\$48.42) as attorney's fees on this appeal, for a total judgment of Two Hundred Forty-two Dollars and Ten Cents (\$242.10), in lawful money of the United States; the same to bear interest at the rate of six per cent (6%) per annum from date of entry.

Done this 25th day of June, 1956, at Anchorage, Alaska.

/s/ BEN C. CONNALLY,
United States District Judge.

Approved as to form.

/s/ JAMES K. TALLMAN,
Attorney for Defendant.

[Endorsed]: Filed and entered June 25, 1956.

[Title of District Court and Cause.]

MOTION

Comes now the Defendant-Appellant, above-named, Paul Mitchell, by and through his attorney, James K. Tallman of the law firm of Bell, Sanders & Tallman, and moves this Honorable Court to set aside the judgment rendered herein for the reason

that such judgment should not have been rendered in view of the facts and law applicable to this case.

This motion is made and based upon the pleadings, papers, and records on file herein and in particular upon the Affidavit of Paul Mitchell, attached hereto, and is made in accordance with rule 60 (b) (6) of the Federal Rules of Procedure.

Dated at Anchorage, Alaska, this 29th day of June, 1956.

BELL, SANDERS & TALLMAN,

By /s/ JAMES K. TALLMAN,
Attorney for Defendant-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed July 2, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Paul Mitchell, being first duly sworn, deposes and states:

That he is the Defendant-Appellant above named and makes this Affidavit for the purpose of attempting to obtain the relief from a judgment or an order entered against him.

Affiant states that he defended his case in the

Justice Court without benefit of counsel for the reason that he was unable to obtain an Attorney to represent him after his Attorney had withdrawn from his case at the last minute; Affiant further states that he cross-examined the witnesses for the Plaintiff in the case and offered pictures to the Justice trying the case as evidence in support of his case. Affiant further states that he paid the sum of Thirty Dollars (\$30.00) to obtain the pictures which were to be used in the support of his case, but the Justice refused to admit the pictures at the time that they were offered and that said pictures were never in evidence.

Affiant further states that he was present and did attend at the trial in the Justice Court and that he intended to defend against the suit and at no time had ever abandoned his defense, but rather entered into a stipulation with the Justice and the other Attorney that he would be allowed an appeal after judgment was rendered against him.

Affiant further states that he told both the opposing Attorney and the Justice that he decided to obtain an Attorney and that he wished to file a cross complaint and subpoena witnesses, but that the Justice refused to continue his case so that he could go ahead as planned.

Affiant further states that too much emphasis cannot be placed upon his attempt to obtain a lawyer and to continue with the proper defense of his case in the Justice Court and at no time did the Affiant ever intend to abandon his case in the Justice Court.

Further Affiant saeth not.

/s/ PAUL A. MITCHELL.

Subscribed and Sworn to before me this 29th day of June, 1956.

[Seal] /s/ JAMES K. TALLMAN,
Notary Public, Territory of
Alaska.

My Commission expires 11/26/58.

Service of copy acknowledged.

[Endorsed]: Filed July 2, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Paul Mitchell, being first duly sworn, deposes and states:

That he is the Defendant-Appellant above-named and makes this Affidavit for the purpose of obtaining relief from a judgment entered against him, wherein the above-entitled Court dismissed his appeal from the Commissioner's Court for the Anchorage Precinct;

That on or about March 26, 1956, I was taken to the Providence Hospital with a severe nose bleed. I was there two days and was supposed to be on

jury duty during that time. I requested a nurse to telephone the office of the Clerk of Court and report that I would not be able to report for duty on the Petit Jury panel, as I was confined to the hospital with a nasal hemorrhage.

Two days later, I was transferred to the 5005th Air Force Hospital, and was given several blood transfusions. I was discharged from the 5005th Hospital on April 5, 1956, and was told to take it easy for eight to ten weeks, as it would take about that period of time for me to return to normal physically. After my discharge, I returned to Dr. Sydnam, and she issued a certificate stating that I would need another week's convalescence. This document was turned over to my attorney, Mr. Boyko, who used it to secure a postponement of the case. A photostatic copy is herewith attached, together with a certificate issued later by the same doctor giving me a clean bill of health and dated May 16, 1956.

On or about April 10, 1956, I received a letter from the law firm of McLaughlin & Atkinson, dated April 3, 1956, which reads as follows:

“My client, Mr. C. L. Snipes, has been to see me about the foreclosure of the lien which he filed against your property on November 8, 1955.

“I recommended to Mr. Snipes that he institute action to foreclose, unless payment is made

for the full amount on or before the 20th day of April, 1956.

“GEORGE M. McLAUGHLIN.”

When I received this letter from Mr. McLaughlin, it was good news in that I had been trying to locate Mr. Snipes, in order to sue him and had been informed that he had gone to the States.

This letter was turned over to my attorney, Mr. Boyko, who agreed to handle the case. He gave me the name of a carpenter in Palmer and suggested I have the carpenter look over the work Mr. Snipes had done for me. During the construction season the carpenters are too busy to become involved in a case such as this so I contacted Mr. Harold H. Galliett, Jr., a registered civil engineer, asking for an estimate of his fee to look over the work and possibly appear in Court in my behalf. I told Mr. Boyko what I had done and he advised me not to spend so much money on an engineer as it would be better to give to some lawyer instead. Also Mr. Boyko had the trial postponed from May 10th to May 17th.

On or about the 16th day of May, I had Modern Studios take pictures of Mr. Snipes' work on the house, which could be used as evidence. I contacted the carpenter who had done some work for me while I was in the hospital, and he agreed to appear as a witness for me. On May 17th at 11 a.m. I stopped to see Mr. Boyko, but he was not in his office at that time. His secretary told me the case

was set for 11:30 a.m. that day. I then went to pick up the pictures from Modern Studio, which cost me \$30.00, and returned about 11:20 to see Mr. Boyko. He asked me where my witnesses were and I said I did not know, but he (the carpenter) had promised to be in court. I had wanted Mr. Boyko to subpoena witnesses and file a counterclaim, but Mr. Boyko had not. He said that he would not go into court with me without any witnesses, so I decided to handle the case myself. Mr. Boyko told me that I would lose if I did this and that I would also lose the other case he was handling for me. He gave me the file and I went to court alone.

Outside the courtroom, Mr. Snipes asked me if I had a lawyer and I told him I did not. When the court was in session, I asked for another postponement since I did not have a lawyer, had just been discharged from the doctor's care at 5 p.m. the previous day, and needed time to secure a court reporter, file a cross-complaint and subpoena witnesses. Mr. Snipes' attorney, Mr. Atkinson, strongly objected. The Judge allowed a three-day postponement, which included Friday, Armed Forces Day, and Saturday and Sunday, with the proviso that I allow Mr. Snipes to testify at that time. After his testimony, I cross-examined the witness and Mr. Snipes invoked the 5th amendment. Mr. Atkinson objected to having me cross-examine the witness, but the Judge overruled his objection. During the cross-examination, I attempted to offer to have Mr. Snipes identify the pictures I had had taken and the

Judge told me it was not the proper time for me to offer evidence, whereupon he recessed court.

After court was out, I went to the office of Wilson & Wilson, lawyers, hoping to secure one of them as counsel. However, after waiting for some time to see either one of them, I decided to try elsewhere. I also tried to see Mr. Ray Plummer, but he was out of town. I next contacted Mr. Carl Hutton, of Spenard, but he too, was too busy to take the case. In the meantime, I contacted a small contractor, a Mr. Tell, who advised me to see Mr. Mike Goggens, a professional estimator. Mr. Goggens suggested I contact Mr. Peter Kalamarides since the two of them had worked closely on previous cases. I could not reach Mr. Kalamarides until noon on Monday, when I met him coming from court with Mr. Lynn Kirkland. Mr. Kalamarides said he would take the case, but I should appear in Justice Court at 2 p.m. and ask for a postponement, to give him time to go over the case, then I should contact Mr. Goggens, the estimator and take him to observe the work Mr. Snipes had done.

At 2 p.m. I appeared in Justice Court, feeling ill (distressed from a boil in inside right ear), and informed the court that I still did not have a lawyer or witnesses. Mr. Atkinson, the plaintiff's lawyer, objected and told me that I looked good to him. I replied, "It takes a little more than looking good to stop a hemorrhage. That's what they told me a couple of weeks ago at the hospital when I was bleeding to death."

I informed the court that I contacted Mr. Kalamarides who advised me to ask for another postponement, until he could become familiar with the case. Mr. Atkinson objected to that stating that he saw Mr. Kalamarides in Federal Court that morning and he had said nothing about handling the case. This, of course, was due to the fact that I did not talk to Mr. Kalamarides until noon. Mr. Atkinson asked if I had paid Mr. Kalamarides his Fifty Dollars (\$50.00) retainer fee and I told him he had not asked for one. The Judge told me that he would allow another postponement, if there was some way that I could pay the plaintiff's attorney for his additional trips, but said it could not be done legally, therefore, I would have to go on with the trial.

Mr. Atkinson told the Judge he would not allow a lawyer a third postponement and didn't see why a guy trying his own case should be allowed a third postponement. I then stated that I was not prepared to try the case, that I did not have a lawyer, nor witnesses; in fact, asking me to do so would be like asking one to cut down a tree with his bare hands, or fly an airplane when he had never even seen one before. I further stated emphatically that I did not intend to capitulate because I wanted the case to come to trial and if I should be defeated I would want to appeal the case, which statement motivated Mr. Atkinson to say, in a very low voice (in fact, it was so difficult for me to hear what he said, the Judge had him repeat it), "The thing for the Court

to do is award his client the full judgment and that Mitchell could then appeal the case if he wanted to.”

The Judge agreed. The Judge asked me if I wanted to testify and I just simply said that I was not at all prepared for trial, and he pronounced the judgment against me, then asked if I wanted to give oral notice to appeal. The Judge then asked Mr. Atkinson what the bond should be and Mr. Atkinson said Five Hundred Dollars (\$500.00). That same evening, as soon as I was able to contact Mr. Kalamarides, I told him what had happened and he said he would file the appeal. After waiting a week or so, I was informed Mr. Kalamarides was too busy to start work on the appeal so I contacted Mr. Daines and explained my position. I understood him to say that if I would put up a cashier's check for Five Hundred Dollars (\$500.00) it would suffice as a bond. He also said, “Do you know how they work up here?” I told him “no” and he replied, “They get an appeal which takes about two or three years to come up and the party by then has gone Outside.” I asked him, “Couldn't I get him back?” and he told me that I would be the one to gain by the delay in this case. I said, “I don't want to win the case that way. I want a lawyer and try the case right away.”

Mr. Kalamarides was still too busy to work on the appeal so I called Mr. Bailey E. Bell, who accepted the case for his firm, turning the work over to Mr. James K. Tallman. They appealed the case and Mr. Atkinson filed a motion to have the appeal

rejected on the grounds that my case was ineligible since I did not testify in Court. I then signed an affidavit where I made the statement “* * * entered into a stipulation with the Justice and the other attorney that he would be allowed an appeal if the judgment was rendered against him,” whereas, actually I should have said, “the Justice agreed with Mr. Atkinson’s suggestion that his client should be awarded full judgment and that then Mitchell could appeal the case.” I actually did not agree to the above but accepted it merely on the grounds that I had no other alternative. The Justice at no time ever warned or instructed me that I would be ineligible to appeal the case if I did not testify, but rather it seems now that he did permit me to walk blindly into a legal abyss, so to speak.

The case is still pending.

/s/ PAUL MITCHELL.

Subscribed and Sworn to, before me this 19th day of July, 1956.

[Seal] /s/ JAMES K. TALLMAN,
Notary Public in and for
Alaska.

My Commission expires 11/26/58.

[Endorsed]: Filed July 19, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

David R. Daines, being duly sworn, deposes and says:

I.

That he has personal knowledge of the facts set forth herein for the reason that he presided as justice of the peace in a certain civil action in the Justice's Court, entitled C. L. Snipes, Plaintiff, vs. Paul Mitchell, Defendant.

II.

That the records of the Justice's Court show that the action referred to in paragraph I was continued from the 10th day of May, 1956, to the 17th day of May, 1956, with the consent of both parties.

III.

That on the 17th day of May, 1956, defendant Paul Mitchell, appeared for trial without an attorney, and asked affiant for a continuance for the purpose of obtaining counsel.

IV.

That affiant granted Paul Mitchell the requested continuance to May 21, 1956, subject to the provisions of Section 68-6-5 ACLA 1949, which attorney for plaintiff had invoked as a condition to the granting of a continuance.

V.

That on May 21, 1956, Paul Mitchell appeared without an attorney and requested another continuance, which request was denied.

VI.

That on the 21st day of May, 1956, plaintiff's attorney offered the previously taken deposition of plaintiff as plaintiff's case.

VII.

That when Paul Mitchell was asked by affiant if he wished to offer evidence he merely shrugged his shoulders and did nothing, and that affiant then orally rendered judgment for plaintiff, after which Paul Mitchell began asking questions as to the mechanics of an appeal.

VIII.

That affiant knows of no stipulation entered into between plaintiff's attorney, defendant, and/or the Court, regarding an appeal by defendant.

/s/ DAVID R. DAINES.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ KENNETH R. ATKINSON,
Notary Public in and for
Alaska.

My Commission expires 9/2/1959.

Receipt of copy acknowledged.

[Endorsed]: Filed July 3, 1956.

[Title of District Court and Cause.]

M. O. DENYING MOTION TO SET
ASIDE JUDGMENT

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time, upon motion of James K. Tallman, for and in behalf of Defendant;

It Is Ordered that motion to set aside judgment in Cause No. A-12,275, entitled C. L. Snipes, plaintiff, versus Paul Mitchell, defendant, be and it hereby is denied.

Entered July 20, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: C. L. Snipes, Plaintiff above-named, and to Kenneth Atkinson, his attorney of record:

Notice Is Hereby Given, that the Defendant herein, Paul Mitchell, hereby appeals to the United States Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, from the Judgment rendered herein dismissing the Defendant's Appeal from the Justice Court for Anchorage Precinct, and rendering Judgment against Appellant and Fireman's Fund Indemnity Company, Appel-

lant's surety, on appeal, which Judgment is dated the 25th day of June, 1956, and which Judgment is by reference made a part of this Notice of Appeal as fully as if set out herein; and from all Orders and Judgments rendered in the above-entitled cause.

Dated at Anchorage, Alaska, this 20th day of July, 1956.

BELL, SANDERS & TALLMAN,

By /s/ JAMES K. TALLMAN.

Service of copy acknowledged.

[Endorsed]: Filed July 20, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Kenneth Atkinson, attorney for plaintiff, C. L. Snipes:

Please take notice that on the 27th day of July, 1956, at the hour of 10:00 o'clock a.m., the undersigned, attorney for Defendant, will bring on an oral motion for the setting of a supersedeas bond in the above-entitled matter.

BELL, SANDERS & TALLMAN,

By /s/ JAMES K. TALLMAN,

Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed July 26, 1956.

[Title of District Court and Cause.]

M. O. SETTING TIME FOR HEARING MOTION FOR THE SETTING OF A SUPERSEDEAS BOND

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time, upon the Court's motion;

It Is Ordered that Cause No. A-12,275, entitled C. L. Snipes, Respondent, versus Paul Mitchell, Defendant-Appellant, be and it hereby is set for Friday, July 27, 1956, at 10:00 o'clock a.m., for Hearing Motion for the Setting of a Supersedeas Bond.

Entered July 26, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF EDGAR PAUL BOYKO

United States of America,
Territory of Alaska—ss.

Edgar Paul Boyko, being first duly sworn, deposes and says:

1. My name is Edgar Paul Boyko. I am an attorney at law, licensed to practice in the Territory of Alaska, the State of Maryland, District of Columbia, and a member in good standing of the Bar of

the United States Supreme Court. I have been a licensed and practicing attorney since April, 1946.

2. During the early part of 1954, I was consulted by Mr. Paul A. Mitchell, the Defendant-Appellant in the above-entitled cause, in connection with another matter. At that time, Mr. Mitchell indicated to me that he considered himself somewhat of an expert on legal proceedings, having won a contested Land Office proceeding without the aid of legal counsel, on his own appeal to Washington, D. C. On various other occasions, Mr. Mitchell saw fit to advise me on just how his legal matters should be conducted by me on his behalf. Mr. Mitchell appeared to me rather unco-operative, litigious, and self-willed; he came to me with numerous petty complaints which he wished to have prosecuted by legal means and which I declined; he attempted on several occasions to tell me how to proceed in his matters and some of his instructions were entirely self-contradictory. As a result, on or about June 25, 1954, I requested Mr. Mitchell to obtain another attorney and tendered his file, together with a check in the full amount of the retainer he had previously paid me. However, Mr. Mitchell was most insistent at that time that he desired to have me as his attorney and assured me that he would co-operate thereafter. Upon this assurance, I retained his file.

3. Sometime in the early part of April, 1956, Mr. Mitchell called upon me, and presented to me a claim from the firm of McLaughlin & Atkinson, representing Mr. C. L. Snipes, concerning a sum

alleged to be due Mr. Snipes for work and labor performed in erecting a cabin on a tract near Anchorage, sought to be acquired by Mr. Mitchell under the public land laws. Mr. Mitchell stated to me that he thought that he had a meritorious defense to this claim, in that the work allegedly had not been done in the proper manner and would have to be replaced and in that he had already paid the claimant more than he was entitled to for his services.

4. Upon listening to Mr. Mitchell's statement of his defense, I suggested that he obtain the services of a qualified architect-engineer or estimator to evaluate the work done by Mr. Snipes and to furnish me with a written statement of such evaluation or estimate, together with photographs of the cabin, so that I might be able to prepare a defense.

5. Subsequently, Mr. Mitchell informed me that he had consulted a local firm of architects and had been quoted a fee of several hundred dollars for this estimate. At that time I advised him that this was an excessive amount to spend in the defense of this claim; that he could save himself money by obtaining the services of a qualified master-carpenter or similar craftsman and that if he desired to spend some additional funds, he should use them to obtain pictures and other suitable evidence. At no time did I tell Mr. Mitchell, as alleged in lines 24 through 27, that "it would be better to give it to some lawyer instead." The statement just quoted is an outright lie and misrepresentation.

6. Subsequently, Mr. Mitchell advised me that he had obtained the services of Mr. Harold H. Galliett, Jr., a registered civil engineer and experienced estimator, and that he had taken him out to the tract to look over the cabin. I telephoned Mr. Galliett and had a conversation with him, and he advised me that he had looked over the work and felt that the labor put into it by Snipes was worth approximately \$100.00 and that he had so told Mr. Mitchell. Mr. Mitchell indicated to me that he was dissatisfied with this estimate, because Mr. Mitchell felt that he was entitled to assert a counter claim against Mr. Snipes, whereas, if Mr. Galliett's estimate was correct, Mr. Mitchell would not be entitled to recover anything from Mr. Snipes. I thereupon advised Mr. Mitchell that, in view of the fact that the trial date was fast approaching, he had better get together with Mr. Galliett and see if Mr. Galliett would look at the property again and revise his estimate, or, otherwise, to retain another expert witness, in the event that he did not have confidence in Mr. Galliett's estimate.

7. Subsequently, Mr. Mitchell advised me that he had had an argument with Mr. Galliett and had discharged him. However, he had not obtained anyone else to make an estimate and the trial date was then only a few days away. However, inasmuch as Mr. Mitchell further advised me that he had been to the hospital with a severe nose bleed; that he felt weakened and dizzy and that he was still under doctor's care; and since he furnished me with a medical certificate, I was able to obtain a continu-

ance of the trial for a period of approximately a week or ten days. I advised Mr. Mitchell to make good use of this time to obtain additional evidence. However, three days before the trial Mr. Mitchell came into my office and stated that he still had no evidence, but that he still felt sick and could not appear. I advised him at that time, that Mr. Atkinson had opposed the last continuance on the ground that his client wished to leave the area on a job and that I could not expect consent to another continuance, but would ask for one if he furnished me with another medical certificate. I further advised him that if he could not obtain such a certificate, that he would have to be prepared to go to trial on May 17 at 11:30 a.m., the date set at the time of the first continuance, of which Mr. Mitchell had been informed previously.

8. I did not hear from Mr. Mitchell for several days, but on May 17, the date of the trial, he appeared in my office approximately thirty minutes before the trial was to commence and advised me that he had no witnesses of any kind and that he did not have a medical certificate as requested, but wished to go to trial. I thereupon asked him just how he proposed to prove his case, to which he replied "by cross-examination of the plaintiff, Mr. Snipes." I told him that I did not see how he could possibly win his case without evidence of any kind to support his contentions, except his own statement; that the estimate of Mr. Galliett, while not as favorable to him as he desired, would have been a great deal preferable to not having any witnesses

at all. Mr. Mitchell then became quite indignant and suggested that perhaps it would be better if, once again, he tried his own case. Upon ascertaining that he was serious, I turned over to him his entire file and he left my office. I subsequently saw him in the Justice's Court and overheard conversations pertaining to his request for a continuance because he was not represented by counsel, a request which, I understand, was granted. At no time did Mr. Mitchell inform me that a carpenter would appear in Court as his witness, as set forth in lines 4-6, on page 3 of his affidavit, which latter statement is entirely untrue. Moreover, at the time I observed Mr. Mitchell in the Justice's Court later, he was alone and there were no witnesses present in his behalf. He has not stated in his affidavit the name of this carpenter and I do not believe that such a witness ever existed. In any event, had Mr. Mitchell told me that he did have a witness to back up his testimony, I would not have hesitated to represent him and I would have represented him in any event, even in the face of the hopelessness of his case and his lack of co-operation, had he not insisted on handling his own trial. Knowing his previous attitude and his claim to legal prowess as a result of the Land Office case he won, I felt that in good conscience I should not insist on representing him, since he was bound to lose his case and would only blame me for it. I did not, of course, realize that I would be blamed either way.

9. Since then, it appears that Mr. Mitchell has been to several attorneys and has been making vary-

ing accusations against them as well as against the Deputy United States Commissioner. These accusations and innuendos are contained in three affidavits filed by Mr. Mitchell in the above-entitled case through his attorney James K. Tallman. The first of these affidavits, dated June 22, 1956, was ordered stricken from the record of this case by Judge Ben Connally. None of these affidavits were ever served upon me, nor was I ever advised by Mr. Tallman that he had filed these affidavits but I was limited to such information as Mr. Atkinson was kind enough to make available to me and to the chance of overhearing certain matters on Motion Day, in the outer offices of the Judge's Chambers and in the Justice's Court, based upon which I made an independent investigation and discovered the affidavits filed by Mr. Mitchell through Mr. Tallman. I subsequently obtained copies of these papers through the courtesy of Mr. Atkinson.

10. Based upon a careful examination of these affidavits and particularly the affidavit dated July 19, 1956, it is my belief as a trained and experienced attorney, that the allegations therein contained are immaterial to the issues herein; that they are impertinent in that these allegations are neither responsive nor relevant to the issues involved in the action and could not be put in issue or be given in evidence between the parties. Moreover, the said allegations are scandalous, in that they unnecessarily and cruelly reflect upon the moral and ethical character of affiant, as an attorney and officer of this Court, besides being irrelevant and untrue.

11. The foregoing affidavit is made based upon my personal knowledge and for the purpose of supporting my motion to strike from the record the aforesaid immaterial, impertinent and scandalous affidavit of Paul A. Mitchell and generally, to advise this Court in the administration of justice.

/s/ EDGAR PAUL BOYKO.

Subscribed and Sworn to before me, a Notary Public in and for the Territory of Alaska, this 27th day of July, 1956.

/s/ VERA LYNN KNUTSON,
Notary Public in and for
Alaska.

My commission expires: 2-20-1960.

Service of Copy acknowledged.

[Endorsed]: Filed July 27, 1956.

[Title of District Court and Cause.]

M. O. SETTING SUPERSEDEAS BOND

Now, at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now, at this time upon motion of James K. Tallman, for and in behalf of the defendant,

It Is Ordered that supersedeas bond in cause No. A-12,275, entitled C. L. Snipes, Plaintiff, versus Paul Mitchell, Defendant, be, and it is hereby, set at \$500.00.

Entered August 17, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS CASH DEPOSIT

I, the undersigned Defendant-Appellant, acknowledge that I am bound to pay to C. L. Snipes, Plaintiff-Respondent, the sum of Five Hundred Dollars (\$500.00).

The condition of this supersedeas cash deposit is that whereas the Defendant-Appellant has appealed to the Court of Appeals for the Ninth Circuit from the judgment of this court, entered on the 25th day of June, 1956, if this Defendant-Appellant shall pay the amount of the final judgment herein if his appeal shall be dismissed or the judgment affirmed or modified together with all costs that may be awarded, then this supersedeas cash deposit is void, otherwise to be and remain in full force and effect.

The sum of Five Hundred Dollars (\$500.00) in cash is herewith deposited with the clerk of the above-entitled Court, to be applied in accordance with the above conditions.

Approved:

/s/ PAUL A. MITCHELL,
Defendant-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

DESIGNATION OF POINTS

I.

That the Court erred in granting Plaintiff's Motion to dismiss appeal for the reason that no findings of fact and conclusions of law were made by the Court and the Judgment appealed from herein is not based upon findings of fact and conclusions of law.

II.

That the Court erred in granting Plaintiff's Motion to dismiss appeal from the Justice Court for the reason that Defendant-Appellant is entitled to an appeal as a matter of law and that Defendant-Appellant's appeal was timely perfected from the Justice's Court to the District Court.

III.

That the Court erred in summarily dismissing Defendant-Appellant's appeal from the Justice's Court since said dismissal required the disposition of a genuine and material issue of fact.

Dated at Anchorage, Alaska, this 24th day of August, 1956.

BELL, SANDERS & TALLMAN,

By /s/ JAMES K. TALLMAN.

Service of copy acknowledged.

[Endorsed]: Filed August 24, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10(1) of the rules of the United States Court of Appeals, Ninth Circuit, and of Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure, and the designations of counsel, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from judgment filed and entered in the above-entitled cause by the above-entitled Court on June 25, 1956.

Dated at Anchorage, Alaska, this 4th day of September, 1956.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15295. United States Court of Appeals for the Ninth Circuit. Paul Mitchell, Appellant, vs. C. L. Snipes, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed September 13, 1956.

Docketed: September 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15,295

United States Court of Appeals

For the Ninth Circuit

PAUL MITCHELL,

VS.

C. L. SNIPES,

Appellant,

Appellee.

BRIEF OF APPELLANT.

BELL, SANDERS & TALLMAN,

BAILEY E. BELL,

WILLIAM H. SANDERS,

JAMES K. TALLMAN,

Central Building, Anchorage, Alaska,

Attorneys for Appellant.

FILE

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PAUL P. O'BRIEN, C



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No. 15,295

United States Court of Appeals For the Ninth Circuit

PAUL MITCHELL,

Appellant,

VS.

C. L. SNIPES,

Appellee.

BRIEF OF APPELLANT.

JURISDICTION AND PLEADINGS.

A. Jurisdiction.

Jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 76, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Sec. 101. The jurisdiction of the Court of Appeals rests on Section 1291, of the New Federal Judicial Code, and the Federal Rules of Civil Procedure.

The jurisdiction of the Court in general is not in issue. However, the authority of the particular judge, the Honorable Ben C. Connally from the Southern District of Texas, to sit in the District Court of the District of Alaska, is a question that is being raised very briefly on this appeal.

B. Pleadings.

This case was started by the filing of a complaint in the Justice Court for the Anchorage Precinct on April 27, 1956. A judgment was then entered on the 21st day of May, 1956, on the complaint. A Notice of Appeal, appealing to the District Court for the Third Judicial Division was then filed on May 26, 1956, and the appeal perfected. After the appeal was perfected, a Motion to Dismiss Appeal with a Notice of Motion, was filed on June 15, 1956, and, upon argument, a minute order granting motion to dismiss appeal was entered on June 22, 1956. A formal order dismissing appeal was signed on the 25th day of June, 1956, along with a formal judgment at the same time. A Motion to Set Aside the Judgment was filed on the 29th day of June, 1956, which motion was supported by affidavits, and an opposing affidavit was filed. After argument a minute order denying motion to set aside the judgment was entered on July 20, 1956. A notice of appeal to this Court was filed on the same day as the minute order.

STATEMENT OF THE CASE.

This case is here on appeal as a result of the District Court's dismissal of Appellant's case which had been appealed from the local Justice Court to the District Court. The District Court dismissed the case because Appellant had not offered testimony in the Justice Court.

The primary issue herein is simple and merely involves construction of the Alaskan Statute authorizing appeal from the Justice Court to the District Court. The facts leading up to the dismissal follow:

On April 27, 1956, the Appellee herein filed a suit in the Justice Court for the Anchorage Precinct, Anchorage, Alaska, against the Appellant for a certain sum of money allegedly due the Appellee. The Appellant appeared on the 17th day of May, 1956 (R. 21, 26) without an attorney, although he had tried to get one. (R. 26, 27.) The Appellant stated in his affidavit, in reference to his attorney who had previously been retained in this matter, that the attorney would not go into Court with Appellant without any witnesses so Appellant took his file from the attorney and went to Court alone. (R. 16.) The attorney involved, however, did state that the Appellant insisted on handling his own trial. (R. 30.) The Appellant asked for another postponement at this time for the reasons indicated in his own words:

“I did not have a lawyer, had just been discharged from the doctor’s care at 5:00 P.M. the previous day, and needed time to secure a court reporter, file a cross-complaint and subpoena witnesses.”

The justice granted the continuance to May 21, 1956, the next business day of the Court, since the continuance was over one holiday, a Saturday and a Sunday. (R. 21.) The testimony of the plaintiff (Appellee herein) was given on the 17th day of May, and the plaintiff was cross-examined by the Appel-

lant. (R. 16.) The Appellant also offered some pictures to the Appellee for his examination which the Appellant had ordered on the day before. (R. 15.) The pictures were not admitted into evidence by the Court. (R. 16, 17.)

After the Court recessed, the Appellant attempted to contact attorneys Wilson & Wilson, Mr. Ray Plummer, Mr. Carl Hutton and Mr. Peter Kalamarides. (R. 17.) The Appellant was unsuccessful in contacting an attorney until noon on Monday, May 21, 1956, at which time he met Mr. Kalamarides and was informed that Mr. Kalamarides would take the case. (R. 17.) Mr. Kalamarides told Appellant to appear and asked for a postponement. The Appellant did appear in Justice Court, in accordance with Mr. Kalamarides' instructions, whereupon the Appellant informed the Court that he had obtained the services of Mr. Kalamarides and requested another continuance. (R. 18.) The Appellee's attorney opposed the continuance and argued that the thing for the Court to do was to award his client the full judgment and that Mitchell could then appeal the case if he wanted to. (R. 18, 19.) The Justice complied by awarding the judgment to the Appellee.

After the judgment was awarded to the Appellee, discussion was held concerning the appeal, and the amount of the bond for the appeal, which finally was set at Five Hundred Dollars (\$500.00). (R. 19.)

That evening, May 21, 1956, the Appellant contacted Mr. Kalamarides. Mr. Kalamarides informed

Appellant that he would file an appeal. (R 6.) However, the appeal was finally perfected by the counsel representing Appellant herein. (R. 19.)

On June 15, 1956, the Appellee moved to dismiss the appeal by a motion that did not set forth the grounds therefor. (R. 7.) Seven days later, on June 22, 1956, a hearing was held on said motion at which time a minute order granting motion to dismiss appeal was entered by the Honorable Ben C. Connally, District Judge from the Southern District of Texas. (R. 8.) The formal order dismissing the appeal, and the judgment, were signed and entered on June 25, 1956, by the Honorable Ben C. Connally. This appeal followed.

SPECIFICATIONS OF ERROR.

I.

That the Court erred in granting Plaintiff's Motion to dismiss appeal for the reason that no findings of fact and conclusions of law were made by the Court and the Judgment appealed from herein is not based upon findings of fact and conclusions of law.

II.

That the Court erred in granting Plaintiff's Motion to dismiss appeal from the Justice Court for the reason that Defendant-Appellant is entitled to an appeal as a matter of law and that Defendant-Appellant's appeal was timely perfected from the Justice's Court to the District Court.

III.

That the Court erred in summarily dismissing Defendant-Appellant's appeal from the Justice's Court since said dismissal required the disposition of a genuine and material issue of fact.

IV.

That the District Court Judge herein was without jurisdiction in this matter.

ARGUMENT.

I.

THAT THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS APPEAL FOR THE REASON THAT NO FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE MADE BY THE COURT AND THE JUDGMENT APPEALED FROM HEREIN IS NOT BASED UPON FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Some question may be raised as to the proper rule under which this case should fall. It can be argued that the motion for dismissal of the appeal should be construed as falling under Rule 12 (b) (6), failure to state a claim upon which relief can be granted. It may also be construed as falling under Rule 56, summary judgment. If the decision falls under either Rule 12 (b) (6) or Rule 56, then no findings by the Court are necessary, by virtue of Rule 52(a). However, if this case falls under Rule 41 (b), then Findings of Fact and Conclusions of Law should have been filed. The pertinent part of Rule 41 (b) is quoted herewith:

“(b) Involuntary Dismissal: Effect Thereof. . . . if the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. . . .”

The dismissal herein was unquestionably involuntary since the dismissal has been resisted at all stages of the proceedings.

The above quoted Section of 41(b) appears clear enough, except with respect to its application to matters in the nature of the case at bar. That is, it does not specifically provide for the disposition of cases on appeal to the District Court from the Justice Court of Alaska. The problem, of course, is whether or not the rule when referring to “Judgment on the merits against the plaintiff” would also apply in the case of “Judgment on the merits against the appellant.” The terminology of the parties in reference to the appeal from the Justice Court is indicated in Sec. 68-9-3, A.C.L.A. (1949):

“The appeal is taken to the district court, and may be taken within thirty days from the date of the entry of the judgment. The party appealing is known as the *appellant* and the adverse party the *respondent*, but the title of the action is not thereby changed.” (Emphasis ours.)

From the foregoing it can be seen that an involuntary dismissal is not against the "plaintiff" in the District Court but against the "appellant" in cases that are appealed from the Justice Court. The most reasonable interpretation that can be placed upon the meaning of 41(b) is that the drafters meant "a party seeking relief," when they referred to "plaintiff" and thus the rule would also apply to an Appellant from the Justice Court who was subjected to an involuntary dismissal. Any other construction would distort the application of this particular rule. It would result in a requirement of findings, in involuntary dismissals, when the plaintiff in the Justice Court appealed the case, but not when the defendant appealed. The drafters could hardly have intended such a strained result.

The judgment given in this case is clearly judgment on the merits (R. 10) and, in any event, is so defined by Rule 41(b) which states:

"... and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

II.

THAT THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS APPEAL FROM THE JUSTICE COURT FOR THE REASON THAT DEFENDANT-APPELLANT IS ENTITLED TO AN APPEAL AS A MATTER OF LAW AND THAT DEFENDANT-APPELLANT'S APPEAL WAS TIMELY PERFECTED FROM THE JUSTICE'S COURT TO THE DISTRICT COURT.

This appeal is primarily concerned with the lower Court's interpretation of Sec. 68-9-1, A.C.L.A. (1949). This statute is quoted in full:

“Right of Appeal. Either party may appeal from a judgment given in a justice's court, in a civil action, when the sum in controversy is not less than fifty dollars, or for the recovery of personal property of the value of not less than fifty dollars, exclusive of costs in either case, except when the sum is given by confession or for want of an answer, as prescribed in this chapter and not otherwise. (CLA 1913, Sec. 1827; CLA 1933, Sec. 5591.)

To be specific, the particular construction in issue is that concerning the clause “except when the sum is given by confession or for want of an answer.”

The appellee's case appears to be based almost solely upon the 1902 Alaska case of *Everton v. Smith*, 1 Alaska 422, which essentially held, as the headnote of the case indicates:

“The defendant filed a formal answer in the justice's court, but did not appear or offer any evidence on the day of trial. Upon the testimony of the plaintiff, and in the absence of the defendant, the justice rendered judgment for plaintiff. Defendant appealed, and upon a motion to

dismiss the appeal in the District Court it was held that defendant's unexplained failure to appear at the trial was an abandonment of his answer, and that judgment was properly rendered against him, and that he had no absolute right of appeal to and trial in the District Court. Appeal dismissed."

The facts in the *Everton* case, however, are different from the case at bar, for in the case at bar the Appellant did everything in his power to defend his case by attempting to get an attorney to represent him, and by personally appearing before the Justice Court at every stage of the proceedings and even attempting to handle his own case by cross-examining the plaintiff's witnesses and by tendering to the Court certain evidence in the form of photographs. Whereas, in the *Everton* case, the defendant failed to appear at the time of the hearing and did not even offer an excuse after entry of the judgment for such failure to appear. The Court indicated its opinion on that point at page 426 of the opinion as follows:

"The court is justified in assuming, under such conditions, that the appellant has no excuse to offer for his failure to be present before the justice, but stands upon his bare right to have his case heard on the merits for the first time in this court. He has no such right under the law. * * *"

A case that is much more in point than the *Everton* case is an Alaskan case that was decided approximately ten (10) years after the *Everton* case, namely,

in 1912. This is *Johnson v. Johnston-Coutant Co.*, 4 Alaska 456. In this case the plaintiff sued defendant in the Justice Court and appeared at the time of the trial, by attorney, to request a continuance. The defendant filed an answer and demanded trial. The Court refused the plaintiff's continuance and after the defendant had waited an hour, judgment was rendered for the defendant. When the Court called the case for trial the plaintiff's attorney departed from the courtroom announcing that he would have nothing to do with the trial. After the judgment was rendered the plaintiff appealed to the District Court and the defendant subsequently moved to dismiss the appeal. The Court denied the motion to dismiss the appeal and stated at page 463 of the opinion:

“The right of appeal is a substantial right granted to any dissatisfied litigant who feels himself aggrieved by the judgment, and, before a court should declare that a party has lost his right of appeal by conduct which is contended amounts to a voluntary nonsuit or a confession, the record should be such as to prevent any other reasonable conclusion than that the appellant had abandoned his cause before the justice, submitted to voluntary nonsuit, or confessed the judgment that was entered. The record in this case warrants the inference that the plaintiff, by applying for a continuance, did not consider himself able to go to trial at that time, and, although his showing for a continuance may have been entirely insufficient, yet the fact that he did appear and apply for a continuance warrants

the conclusion that he did not intend to submit to a voluntary nonsuit or confess the judgment that was entered against him.”

The situation in the case at bar is very similar except that the Appellant in the case at bar actually gave less indication of having abandoned his case than did the plaintiff in the *Johnson* case. In the *Johnson* case the attorney for the plaintiff left the courtroom and stated that he would have nothing further to do with the trial after he had moved for a continuance which was refused. But in the case at bar, the Appellant not only moved for a continuance so as to enable his attorney to prepare the case for him (R. 18), but actually stayed in the courtroom and cross-examined the plaintiff's witnesses and offered evidence in the form of photographs. It is true that the evidence was not accepted, and it is probably true that the evidence in the form of photographs was not offered at the proper time. Nevertheless, the Appellant was doing everything possible to defend his case and at no time had ever inferred that he had abandoned the defense of his suit.

The Court in the *Johnson v. Johnston-Coutant Co.* case supports his determination by case authority from other jurisdictions at pages 461 and 462. However, the Court's own reasoning appears to be extremely sound when the Court indicated that it was not reasonable to assume that the plaintiff submitted to, or confessed, judgment, and the reasoning is clearly set forth on page 462 of the opinion as follows:

“It may be said that, in the case at bar, plaintiff’s counsel did not remain in the courtroom after the court overruled the motion for continuance and ordered the trial to proceed. He did, however, appear at the time set for trial and move for a continuance, which motion was denied. Is it not fair to infer, when nothing to the contrary appears, that the plaintiff considered himself unable to go to trial at that time; and while the court must assume that the ruling of the commissioner’s court, in denying the motion for continuance, was correct, yet the fact that the motion was made indicates that the plaintiff did not desire to submit to a voluntary nonsuit or to confess judgment which was entered against him.”

The uncontroverted affidavit of Appellant clearly indicates that he had tried to continue the case and was not abandoning his suit. With reference to the day upon which the Justice Court rendered judgment against the Appellant, the Appellant stated at page 18 of the Record:

“I informed the court that I contacted Mr. Kalamarides, who advised me to ask for another postponement, until he could become familiar with the case. * * *”

Further on in the same page, the Appellant stated:

“Mr. Atkinson told the Judge he would not allow a lawyer a third postponement and didn’t see why a guy trying his own case should be allowed a third postponement. I then stated that I was not prepared to try the case, that I did not have a lawyer, nor witnesses; . . . I further stated

emphatically that I did not intend to capitulate because I wanted the case to come to trial and if I should be defeated I would want to appeal the case, . . .”

Then, after this discussion, at page 19 of the Record, it was indicated that judgment was given against the Appellant as indicated.

“The Judge agreed. The Judge asked me if I wanted to testify and I just simply said that I was not at all prepared for trial, and he pronounced the judgment against me, then asked if I wanted to give oral notice to appeal. * * *”
(R 19.)

The Appellant’s statements as to what happened are substantiated by the affidavit of the Justice who gave the original judgment in the Justice Court as follows:

“That on May 21, 1956, Paul Mitchell appeared without an attorney and requested another continuance, which request was denied.”

The Justice indicated that he did render judgment for the plaintiff, Appellee herein. (R. 22.)

It should be noted that although the grounds for the Appellee’s motion to dismiss appeal were that the Appellant had abandoned his case in the Justice Court, no grounds appeared in the Appellee’s motion. (R 7.) This directly conflicts with Rule 7(b) which states, in part:

“(1) An application to the court for an order shall be by motion which, . . . shall state with particularity the grounds therefor. . . .”

Not one word concerning the grounds appears in the Motion, although the Appellee's position can probably be determined from the argument contained in the brief which the motion indicated was attached thereto. In any event, the Appellee did not strictly comply with the rule indicated. A discussion on this point is given in 1 Barron and Holtzoff, 405, 406:

"A motion must specify with particularity the grounds upon which the motion is based and set forth the relief or order sought. These requirements are mandatory; compliance is essential to orderly procedure; and an order made on oral motion not in the course of hearing or trial is erroneous for want of notice."

The last cited authority contains footnotes supporting the statement as follows, at pages 405 and 406:

"Motion to strike complaint because it did not state claim upon which relief could be granted was subject to dismissal. *Advertisers Exchange v. Bayless Drug Store*, D.C. N.J. 1943, 3 F.R.D. 178."

"Rule 7 requiring motions to state with particularity the grounds therefor was not intended to be a matter of form, but was real and substantial. *Steingutt v. National City Bank of New York*, D.C. N.Y. 1941, 36 Fed. Supp."

With respect to the discussion above as to which rule this case falls under, it should also be observed that the Court and Appellee must have treated this case as not falling under Rule 56. This conclusion follows from the observation of Appellee's notice of

motion (R. 7) which indicates that the motion was noticed to be heard seven (7) days after it was filed and served. Under Rule 56(c), the motion would have to be served at least 10 days before the time fixed for the hearing. Here the motion was not only noticed to be heard seven days later, but actually was heard on June 22, 1956, which was exactly one (1) week after filing and service of the motion. (R. 8.)

In construing that part of 68-9-1, A.C.L.A. (1949) reading, "or for want of an answer," it should be borne in mind that a formal answer did not have to be filed in the Justice Court herein. The pertinent statute is Section 68-3-1, A.C.L.A. (1949), which is quoted herewith:

"Formal Pleadings dispensed with: Time of filing instruments and statements. No formal pleadings on the part of either plaintiff or defendant shall be required in a justice's court; but before any process shall be issued in any action the plaintiff shall file with the justice the instrument sued on and a statement of the account as of the facts constituting the cause of action upon which the action is founded; and the defendant shall, before the trial is commenced, file the instrument, account, or statement of his setoff or counterclaim relied upon."

Thus, even though the Appellee did file a written complaint, it was not necessary that the defendant, Appellant herein, file a written answer.

Since formal written answers are not necessary in the Justice Court, it seems that the appearance of the Appellant alone would preclude this case from

falling under that particular category "for want of an answer." This also seems to be the construction of the Court in the *Everton v. Smith* case, 1 Alaska 422, where the defendant had filed a written answer but failed to appear at the time of the trial. The Court held that the failure to appear must be construed as the waiver of his answer and that, therefore, no appeal would lie. It was, therefore, the failure to appear at the time of the trial that was fatal in the *Everton* case.

It should be noted that the holding of the *Johnson* case as indicated by the headnote is incorrect, apparently due to typographical error. The holding of that case is, substantially, that where a litigant appears at the time of the trial in the Justice Court and moves for continuance, he has not abandoned his suit and a judgment rendered is not a judgment for want of an answer nor one by confession, and is, therefore, appealable.

In dismissing the Appellant's appeal, the District Court appears to have ignored another statute which should have some bearing on such appeals. This is Section 68-9-10, A.C.L.A. (1949):

"When appeal perfected: Trial de novo. Upon the filing of the transcript with the clerk of the district court the appeal is perfected, and the action shall be deemed pending and for trial therein as if originally commenced in such court, and the district court shall proceed to hear, try, and determine the same anew, without regarding any error or other imperfection in the original summons and the service thereof, or on the trial,

judgment, or other proceeding of the justice or marshal in relation to the cause.”

Since the appeal herein in the District Court had been perfected, the case should have been deemed pending and for trial as if it had originally been commenced in the District Court. It also appears that if there were any defects in the Justice Court proceeding, this statute would authorize the District Court to continue with the case and ignore such “error or other imperfections.”

The arguments may be urged that Section 68-9-10 would be inconsistent with the exceptions indicated in Section 68-9-1. However, this is not necessarily so and Section 68-9-10 may be construed as requiring the objecting party to object under Section 68-9-1 before the appeal is perfected. Such a requirement would be equitable and just since it would require the objections to be taken before the Appellant had incurred the trouble and expense of paying for docket filing fees and undertaking on appeal. In the case at bar, the notice of appeal from the Justice Court was filed on the 25th day of May, 1956. However, the notice of the motion to dismiss appeal was not filed until June 15, 1956. If the Appellant were not entitled to an appeal to the District Court, then the Appellee should have given notice of objections before the appeal was perfected and the case ready for trial *de novo*.

III.

THAT THE COURT ERRED IN SUMMARILY DISMISSING DEFENDANT-APPELLANT'S APPEAL FROM THE JUSTICE'S COURT SINCE SAID DISMISSAL REQUIRED THE DISPOSITION OF A GENUINE AND MATERIAL ISSUE OF FACT.

As indicated above, the proceedings herein may have been treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. No such terminology as "summary judgment" was used in any of the proceedings so it cannot be categorically stated that this case definitely falls under any particular rule. However, some such interpretation may follow under Rule 12b. This is discussed in 1 Barron and Holtzoff, 612-614. A footnote in the last citation at page 614 clearly indicates Barron and Holtzoff's discussion:

"Under Rule 12(b), as amended, if a motion to dismiss is made for failure to state a claim upon which relief can be granted, and matters outside the pleading are presented to and not excluded by the court, the motion will be treated as one for summary judgment and disposed of as provided in Rule 56. *American Mach. & Metals v. De Bothezat Impeller Co.*, D.C.N.Y. 1948, 8 F.R.D. 324."

The difficulty with finding that the case concerned a question of summary judgment is that none of the issues raised by the plaintiff's complaint were disposed of by the final judgment. No affidavits were offered to support the plaintiff's position on the merits and there is no evidence in the record to support a summary judgment. Presumably, if this case

fell under Rule 56, the pleadings, depositions, and admissions on file, together with the affidavits, if any, should show that there is no genuine issue with any material fact and that the moving party is entitled to a judgment as a matter of law. No such showing can be found.

IV.

THAT THE DISTRICT COURT JUDGE HEREIN WAS WITHOUT JURISDICTION IN THIS MATTER.

The minute order granting motion to dismiss appeal, the order dismissing appeal, and the judgment herein were all rendered by the Honorable Ben C. Connally, a regularly appointed District Judge from the Southern District of Texas, while sitting as a District Judge for the District Court of Alaska. There is no known legislative authority authorizing a District Court Judge from the Southern District of Texas to sit as a District Court Judge for the District of Alaska.

Since this question has been raised in the case of *Reynolds v. Lentz, et al.*, No. 15409, presently on appeal before this Court, the question is raised herein only briefly. This point is raised only on the assumption that it will have been determined in the *Reynolds v. Lentz* case by the time that this case is heard and it is, therefore, felt that it would be pointless to pursue the matter further than has been done herein.

CONCLUSION.

The District Court decision herein amounts to the holding that the Appellant had lost his right to appeal by allowing a judgment in the Justice Court to be entered, either through want of an answer or by confession. The result is the deprivation of a very substantial right on extremely nebulous grounds. It was error for the District Court to reach such a conclusion herein and the appeal from the Justice Court should not have been dismissed except where the record was such as to prevent any other reasonable conclusion than that the Appellant had abandoned his cause before the Justice, submitted to a voluntary nonsuit or confessed the judgment that was entered.

The Judgment of the Court below should be reversed.

Dated, Anchorage, Alaska,

February 13, 1957.

BELL, SANDERS & TALLMAN,

BAILEY E. BELL,

WILLIAM H. SANDERS,

JAMES K. TALLMAN,

Attorneys for Appellant.

No. 15296

**United States
Court of Appeals**
for the Ninth Circuit

RICHFIELD OIL CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

OCT 29 1956

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 17, California.

For Appellee:

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United States Attorney;

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Attorney General;

GEORGE COUCHRAN DOUB,
Asst. Attorney General;

LEAVENWORTH COLBY,
Sp. Asst. to the Attorney General,
Department of Justice,
Washington 25, D. C.



In the District Court of the United States in and
for the Southern District of California, Central
Division

In Admiralty No. 19103—BH

RICHFIELD OIL CORPORATION, a Corporation,
Libelant,

vs.

UNITED STATES OF AMERICA,
Respondent.

AMENDED LIBEL IN PERSONAM

To the Honorable, the Judges of the Above-Entitled
Court:

Libelant Richfield Oil Corporation, owner of certain tanker steamships heretofore time chartered to respondent, the United States of America, pursuant to leave of this Court, files this, its amended libel (hereinafter called "libel"), in a cause of contract, civil and maritime, against respondent, the United States of America, and this, its libel, alleges as follows:

For a First Cause of Action

I.

That at all times herein mentioned libelant Richfield Oil Corporation was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and duly authorized to transact business in the State of California, with

its principal place of business at 555 South Flower Street, Los Angeles 17, California. [2*]

II.

That at all times herein mentioned the respondent, the United States of America, was and still is a sovereign which has, by law, consented to be sued herein.

III.

That the Maritime Administration is an agency or instrumentality of the respondent, the United States of America, and has its principal office in Washington, D. C.

IV.

That this suit is brought under the act of March 9, 1920, known as the Suits in Admiralty Act (41 Stat. 525; 46 USCA, 741, et seq.).

V.

That this Honorable Court has jurisdiction of this libel under the provisions of Section 2 of the act of March 9, 1920, known as the Suits in Admiralty Act (41 Stat. 525; 46 USCA, 742).

VI.

That at all times mentioned herein libelant was and still is owner of the American steamship "Charles S. Jones" and that at all times material to this cause of action libelant was the owner of the American steamships "Agwiworld," "Huguenot," "Kekoskee," "Larry Doheny," "Pat Doheny," and "Topila."

VII.

That on January 9, 1942, the respondent, the United States of America acquired the SS "Pat Doheny" under Maritime Commission form of charter party as per copy attached, marked Exhibit "A" and by this reference made a part hereof, which said charter party was numbered MCc 2337; and on January 30, 1942, the said respondent acquired the SS "Charles S. Jones" under charter party in like form, numbered MCc 2718. Addendum One to said form of charter party is attached hereto, marked Exhibit "B" and by this reference made a part hereof. [3]

VIII.

That in April, 1942, the respondent, acting through its agency and instrumentality, the War Shipping Administration, requisitioned all of libellant's tankers enumerated in paragraph VI above and prescribed the form of charter party as Form 102 Warshipoiltime, copy of Part II thereof being attached hereto, marked Exhibit "C" and by this reference made a part hereof; that the Form 102 charter parties on said vessels were as follows:

Name of Vessel	Warshipoiltime Contract No.	Date Delivered	Date Redelivered
SS Agwiworld	WSA 1432R	4-19-42	12-3-45
SS Huguenot	WSA 1433R	4-19-42	Title Req. 7-5-43
SS Topila	WSA 1438R	4-19-42	12-14-45
SS Kekoskee	WSA 1468R	4-21-42	11-29-45
SS Larry Doheny	WSA 1470R	4-24-42	Total Loss 10-6-42
SS Pat Doheny.....	WSA 1644R	4-20-42	12-6-45
SS Charles S. Jones.....	WSA 1231R	4-20-42	12-3-45

IX.

That from the time of said requisitioning, numerous disputes arose and existed between libelant and other shipowners on the one hand and the respondent, the United States of America, and its agencies and instrumentalities, particularly the War Shipping Administration, on the other hand, concerning the responsibility for overtime of members of the vessels' crews made necessary by reason of orders of the United States Coast Guard requiring the maintenance of additional watchmen and the maintenance of a full complement on board at all times while the vessels were in port.

X.

That an attempt was made by Operations Regulation No. 96, issued May 8, 1944, by the War Shipping Administration, to resolve disputes under Clause 7 of Part II of Warshipovertime for the overtime required for security watches. In this regard said Operations [4] Regulation 96 reads in part as follows:

“I—Security Watches

“Subject: Instructions Relating to Certain Labor Costs Under Standard Forms of Time Charters.

“Clause 7 of Part II of the standard forms of time charter provides that the charterer will reimburse the owner for wages and bonuses of ‘additional watchmen or other personnel employed upon the order or request of any Governmental authority.’ The term ‘additional’ is construed to mean

beyond what would be normal in peacetime. The Administrator has determined administratively that, in port, normally one watchman per vessel is employed on a 24-hour round-the-clock basis for all purposes. It is understood that Governmental authorities have ordered that additional watchmen be on duty for security purposes in various ports here and abroad.

“Costs for such additional security or other watchmen required by order or request of any government, as aforesaid, in excess of such normal costs, will be reimbursed by the War Shipping Administration. Overtime paid to officers and crew, in lieu of employing such additional shore watchmen, to comply with such orders or requests and which would not have been incurred in the absence of such orders, will likewise be reimbursed. The foregoing does not apply to watches maintained in repair yards when the vessel is being repaired or drydocked for owner’s account.”

XI.

That notwithstanding Operations Regulation No. 96 the said disputes concerning overtime continued as did other disputes involving libellant and other steamship operators, and on December 6, 1944, the War Shipping Administration issued its G.O. 11, Supp. 9, prescribing a Second Disputes Addendum which was supposed to resolve all disputes covered thereby, including disputes concerning [5] overtime; that the Second Disputes Addendum amended

Clause 7 of Part II of Warshipoiltime in part as follows:

“Clause 7A. The Charterer shall reimburse the Owner for its actual out-of-pocket expenses, including all taxes with respect thereto for which the Owner is responsible, for (1) any war bonuses, extra wages based on the areas to be traversed during, or the ports of call of, any voyage hereunder and extra wages arising out of the nature of any cargo carried hereunder, where such bonuses and extra wages are payable by the Owner to the Master, officers or crew in accordance with ship's Articles or the Owner's collective bargaining agreements or decisions of the Maritime War Emergency Board; (2) all wages and bonuses of any extra officers and men beyond the Vessel's normal complement, who are required to be employed because of the Vessel's service under this Charter, or to provide for any persons carried at the request of the United States of America or additional watchmen or other personnel employed upon the order or request of any governmental authority; (3) required payments (including wages) for or in lieu of returning the Master, officers and crew upon delivery of the Vessel under this Charter from the port of delivery to the nearest port at which the crew could be signed off under the articles; and (4) repatriation costs necessarily incurred by the Owner if the Vessel is ordered to trade indefinitely in foreign areas or between foreign ports. Except as otherwise provided in this Charter or insurance provided or assumed by the charterer, repatriation

expenses shall not be for the account of the Administrator, War Shipping Administration, but nothing herein shall prejudice or waive any right of the Owner to recover from the United States for such payments or expenses, under any provisions of statutory law * * *” [6]

XII.

That libelant, prior to acceptance of the Second Disputes Addendum, entered into an agreement and understanding with the respondent, the United States of America, through its instrumentality and agent, the War Shipping Administration, to the effect that the division of overtime between the charterer and the owner would remain on the basis of the then-audited accounts which libelant was required to maintain for respondent, which said accounts had been audited and approved by the auditors of said respondent. For the convenience of the Court, we are attaching hereto, marked Exhibits “D,” “E,” “F,” “G,” “H,” “I,” and “J,” copies of the correspondence and telegrams exchanged indicating said understanding and agreement, which said Exhibits by this reference are made a part hereof as though fully set forth herein.

XIII.

That after said understanding and agreement, libelant continued to maintain said books, records and accounts in accordance with said understanding and agreement, and ultimately the charter parties were terminated, the vessels were redelivered on the dates indicated in paragraph VIII above, and

the accounts between the owner and the charterer were audited, approved and settled.

XIV.

That approximately three years thereafter, in the fall of 1948, the auditors of the United States Maritime Commission, which agency had succeeded to all of the functions of the War Shipping Administration, again audited the books, records and accounts which libelant had maintained during the charter period for respondent and which had been audited, approved and settled as aforesaid, and made claim upon libelant for payment to respondent of numerous amounts, including crew overtime, which were not due charterer under Warshipovertime, as interpreted by Operations Regulation No. 96 or otherwise, or under the Second Disputes Addendum, [7] or under the understanding and agreement evidenced by Exhibits "D" through "J," inclusive, hereof, or at all.

XV.

That the amount claimed to be due from libelant, as hereinabove alleged, was not at that time completely computed, but respondent estimated the alleged debt would be in the neighborhood of \$75,000.00; and respondent's agency, the Maritime Administration, threatened to collect respondent's said claim by seizing funds due libelant from other governmental agencies.

XVI.

That libelant herein, in view of the foregoing facts, and particularly its prior agreement with

the War Shipping Administration, hereinabove alleged, and the renegotiation agreements hereinafter alleged, believed itself aggrieved by the action of the Maritime Administration and its West Coast Director, L. C. Fleming, and sought relief under the Administrative Procedure Act by instituting suit in the United States District Court for the Northern District of California, which case was finally resolved on October 21, 1953, by a decision of the United States Court of Appeals for the Ninth Circuit, reported at 207 F. 2d 864, holding that the District Court did not have jurisdiction under the Administrative Procedure Act, jurisdiction being exclusively under the Suits in Admiralty Act; that pursuant to said decision of the Court of Appeals, the dismissal by the District Court for want of jurisdiction under the Administrative Procedure Act was sustained, and thereafter libelant met on several occasions with Clarence G. Morse, then general counsel of the Maritime Administration, and members of his staff, attempting to negotiate a settlement of this long-standing dispute; that upon the appointment of Clarence G. Morse, as Administrator of the Maritime Administration, further negotiations to settle the dispute were undertaken with the Administrator and his assistant general counsel, James L. Pimper; that [8] finally early in 1955 the Maritime Administration completed its audit and determined that the amount of its claim with respect to crew overtime aggregated \$27,739.20.

XVII.

That in May, 1955, libelant again met with the assistant general counsel of the Maritime Administration, James L. Pimper, and members of his staff, and in said meeting libelant was advised that the matter would be presented to the Maritime Administrator and the Federal Maritime Board for final action; libelant was also advised that in the event it was determined to continue to press respondent's claim and libelant did not pay promptly, then in that event respondent's agency, the Maritime Administration, would effect collection by seizing funds due libelant from other agencies of respondent, employing the summary procedure of "offset."

XVIII.

That thereafter and on or about July 25, 1955, James L. Pimper, assistant general counsel of the Maritime Administration, advised libelant that the Maritime Administration demanded payment in full of its claims and stated that if such payment were not made within thirty days the sums would be recovered by the employment of the summary procedure of offset or an institution of litigation, and libelant is informed and believes and therefore alleges that respondent would have adopted the summary procedure of offset. See Exhibit "K" hereof.

XIX.

That being convinced that respondent would summarily seize funds of libelant in the hands of other

departments and agencies of respondent and/or summarily offset its claims against debts owing libelant; being informed and believing that such action by respondent would put libelant at great financial and legal disadvantage and would tarnish libelant's otherwise clean record as a supplier of petroleum products, the maintenance of which record was [9] important to libelant; and acting under the compulsion of respondent's coercion, duress and threats, libelant, for the purpose of preventing such seizure of its property, did pay said amount of crew overtime under protest, as evidenced by letter dated August 26, 1955, and attachment, being pages 1, 2 and 5, respectively, of Exhibit "K" hereof.

XX.

That this cause of action is brought to recover from respondent the amount of crew overtime unlawfully exacted from libelant as aforesaid.

XXI.

That, wherefore, as a direct and proximate result of the coercion, duress and compulsion of respondent, libelant has sustained damages in the amount of \$27,739.20.

For a Second Cause of Action

XXII.

Libelant repeats and realleges as fully as though set forth herein at length each and every allegation contained in paragraphs I through XVIII, inclusive, of this libel.

XXIII.

That respondent's claims and demands, other than crew overtime, less credits, aggregated \$6,418.82, making the total of respondent's claim \$34,158.02, as evidenced by the schedule which is attached hereto as page 5 of Exhibit "K" hereof.

XXIV.

That being convinced that respondent would summarily seize funds of libelant in the hands of other departments and agencies of respondent and/or summarily offset its claims against debts owing libelant; being informed and believing that such action by respondent would put libelant at great financial and legal [10] disadvantage and would tarnish libelant's otherwise clean record as a supplier of petroleum products, the maintenance of which record was important to libelant; and acting under the compulsion of respondent's coercion, duress and threats, libelant, for the purpose of preventing such seizure of its property, did pay all of respondent's claims aggregating \$34,158.02 under protest, as evidenced by letter dated August 26, 1955, and attachment, being pages 1, 2 and 5, respectively, of Exhibit "K" hereof.

XXV.

That on September 11, 1944, libelant and respondent entered into Renegotiation Contract number NOd-4643 for the fiscal year ending December 31, 1942, a copy of which is attached hereto, marked Exhibit "L" and by this reference made a part hereof; and subsequent thereto libelant and re-

spondent entered into additional Renegotiation Contracts numbered as follows:

Date	No.	For Fiscal Year Ending
3/18/46	414	12/31/43
10/15/46	516	12/31/44
3/27/47	586	12/31/45

XXVI.

That in determining the amount of profits to be eliminated under said contracts, the renegotiation agency of the respondent determined that libelant should be allowed to retain a profit of twenty-five cents per DWT per month for the charter operation and under said contracts eliminated all of libelant's profits under said charter operations in excess thereof; that in determining the amount to be so eliminated, the renegotiation agency relied upon the books, records and accounts maintained by libelant as respondent's time charter agent under Contract WSA 644, copy of which is attached hereto, marked Exhibit "M" and by this reference made a [11] part hereof, which said books, records and accounts had prior to renegotiation been audited and approved by auditors of the respondent.

XXVII.

That in said Renegotiation Contract NOd-4643 (paragraph 7 thereof), it is provided in part that:

"* * * and this agreement shall not be modified by any officer, employee, or agent of the United States, and this agreement and any de-

termination made in accordance herewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding; subject to the right of the Secretary of the Navy, or his duly authorized representative, to reopen renegotiation in his discretion at any time hereafter upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, including a wilful omission to state a material fact required to make any representation of the Contractor not misleading.”

That the other Renegotiation Contracts contained similar provisions.

XXVIII.

That approximately three years subsequent to the termination of the last of said Warshipoiltime charters, respondent herein reaudited said books, records and accounts notwithstanding the fact that the same had previously been audited and approved, the accounts settled, and libelant had been renegotiated as aforesaid, and respondent claimed that libelant was indebted to the respondent for certain items of overtime and other items, later determined to aggregate \$34,158.02.

XXIX.

That such claims collected under duress by the respondent as aforesaid had the effect of annulling, modifying and setting aside the Renegotiation Contracts and of redetermining downward the [12] amount of profits which had been allowed libelant,

contrary to the provisions of the Renegotiation Contracts.

XXX.

That had such alleged indebtedness been timely asserted and paid prior to the renegotiation, the amount of alleged excessive profits eliminated thereby would have been reduced by exactly the same amount of said claim, and it follows, therefore, that the respondent had already received the amounts claimed, and the said \$34,158.02 collected under duress by respondent has the effect of increasing the amount of alleged excessive profits eliminated notwithstanding that said Renegotiation Contracts provided that said contracts shall be "a final and conclusive determination of the excessive profits."

XXXI.

That as a direct and proximate result of the demands and duress of respondent herein and said payment under protest required thereby, respondent has been unjustly enriched under said charter parties in the amount of \$34,158.02 and libelant has been damaged in the same amount.

XXXII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, said libelant prays that process in due form of law, according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against said United

States of America and that said respondent may be cited to appear and answer upon oath all and singular the matters aforesaid; that this Honorable Court will be pleased to decree judgment in favor of libelant for money had and received, exacted contrary to statute, regulation and contract, and for damages in the amount of \$34.158.02, with interest and costs, and that said libelant may [13] have such other and further relief in the premises as in law and in justice it may be entitled.

/s/ DAVID GUNTERT,
Proctor for Libelant.

Duly verified. [14]

EXHIBIT K
Richfield Oil Corporation
Richfield Building
Los Angeles 17, California

August 26, 1955.

Airmail

Maritime Administration,
U. S. Department of Commerce,
Washington 25, D. C.

Attention: James L. Pimper,
Assistant General Counsel.

Re: Manning Watch Overtime.
Your File: QM189:231.

Gentlemen:

Attached hereto please find Richfield Oil Corporation check No. 37498 in the amount of \$34,-

158.02, representing payment under protest of various items totalling \$33,658.02 set forth in the attached statement prepared by your District Comptroller's Office at San Francisco, together with \$500.00 claimed to be additional crew's overtime shown on records heretofore destroyed.

This payment is protested on the following grounds:

A. As to the Entire Amount:

(1) No sums are due under terms and conditions of the charter parties.

(2) Richfield Oil Corporation is not indebted to the Maritime Administration because all accounts of operation under the several requisition charter parties have been subjected to renegotiation, and any sums which may have been due have already been paid. Said renegotiation was based upon the records and accounts previously audited and approved by the WSA, which the Maritime Administration now seeks to amend. Under said renegotiation, Richfield was allowed to retain 25 cents per dead weight ton as profit for the operation and was required to pay by way of cash or credit all sums in excess of 25 cents per dead weight ton. Had the charges which the Maritime Administration now asserts been timely asserted, the recovery by the Government under the renegotiation contracts would have been decreased by the amount of this payment under protest. It follows, therefore, that the Government has already

received any and all sums which it now claims are due.

(3) The renegotiation contracts constitute an accord and satisfaction of the accounts between the Government and Richfield, and, accordingly, no sums are due.

(4) This claim by the Maritime Administration amounts to a reopening of Richfield's renegotiation agreements, which is prohibited by the terms thereof except in the case of fraud or malfeasance or a wilful misrepresentation of the material fact, and no such showing has been or can be made.

B. As to the Crew Overtime:

(1) No sums are due the Maritime Administration for crew overtime because the War Shipping Administration, as a condition to Richfield's acceptance of the second disputes addendum, in an exchange of correspondence and wires in January, 1945, agreed that overtime should be settled on the basis of the then audited accounts. This claim is a breach of that agreement.

(2) No crew overtime is due the Maritime Administration under the terms and conditions of the charter parties involved.

C. As to the \$500.00 Item:

(1) The sum is not due under the terms and conditions of the charter parties.

(2) This sum cannot be justified as the records have been destroyed, and none was due and pay-

able under the records previously audited and approved by WSA auditors.

Will you please see that this reaches the proper hands for further handling?

Yours very truly,

/s/ DAVID GUNTERT,
Attorney.

DG/sd

Atts.

CC: J. M. Foss.

U. S. Department of Commerce
Maritime Administration
Washington 25, D. C.

Address Reply to
Maritime Administration
And Refer to File No.
QM189:231

July 25, 1955.

Via Air Mail
Richfield Oil Corporation,
Richfield Building,
San Francisco 17, California.

Attention: David Guntert, Esq.
Subject: Manning Watch Overtime.

Dear Sirs:

Reference is made to your letter of May 24, 1955, and prior correspondence and conferences in respect to the captioned matter.

In view of the foregoing, we cannot make a departure in respect to your company from the common terms of settlement offered to and accepted by the other West Coast oil companies against whom the Administration has similar claims for manning watch overtime.

Accordingly, unless we receive word from your company within 30 days that you are prepared to accept settlement of the manning watch overtime on the 55-45 formula agreed to by the other West Coast oil companies and to accept the other WSA charter claims of the Administration in the above-mentioned total sum of \$34,158.02, the Administration will have no other recourse except to institute suit or effect set-off against sums due your company from the Government, as may be appropriate.

Very truly yours,

ELMER E. METZ,

Acting General Counsel;

By /s/ JAMES L. PIMPER,

Assistant General Counsel.

25

Statement Showing Amounts Due Maritime Administration From Richfield Oil Corporation

Refund due charterer (Crew O/T
45-55 basis)

Plus 55% recovered from Underwriters.

Disallowance of Port Charges	
Bill MA-SF 53-11-170	2,087.46
Less Wash. Deduction	1,464.35

Net. Wash. Revision....	623.11
Less O/T included in gross 45-55 study.....	299.48

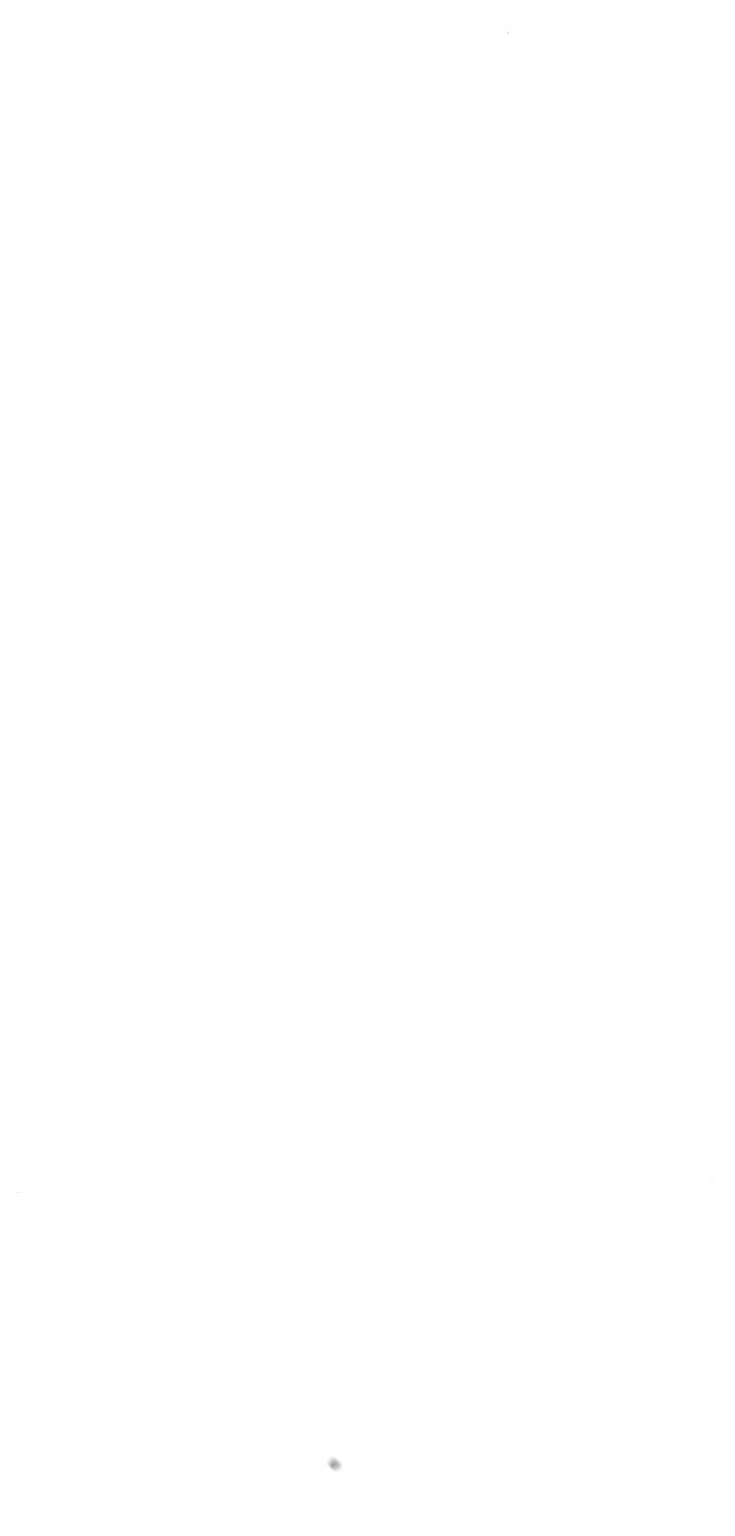
Net Port Charges	
(Kekoskee)	323.63

Less Savings Paid
Charterer in error on
Prior Time Def. Cert.
on SS Charles S. Jones
Less Charter hire re-
fund due owner on Pat
Doheny-Makua Collision
off-hire Cert. No. 2

Prepared by District Comptroller's Office SF.

Receipt of copy attached.

[Endorsed]: Filed June 4, 1956.



[Title of District Court and Cause.]

EXCEPTIONS AND EXCEPTIVE ALLEGATIONS TO THE AMENDED LIBEL

Comes now respondent, United States of America, and excepts to the amended libel filed herein June 4, 1956, on the ground that the allegations set forth in the said amended libel are insufficient to state a cause of action within the jurisdiction of this Honorable Court in that the allegations of the amended libel clearly show that the claim of libelant is for recovery back of a voluntary payment made by libelant as consideration for compromise and settlement of disputed claims.

Exceptive Allegations

Libelant, in Articles IX through XV of its amended libel, together with exhibits attached thereto and referred to in the said articles, alleges the existence of disputes with respondent resulting in respondent's making claim against libelant in the sum of [59] approximately \$75,000.

II.

Libelant, in Articles XVI, XVII, XVIII and XXIII of its amended libel, together with Exhibit "K" attached thereto and referred to in the said articles, alleges that demand was subsequently made upon libelant by respondent in the reduced amount of \$34,158.02.

III.

The letter of July 25, 1955, from the Acting

[Title of District Court and Cause.]

EXHIBITS FOR ATTACHMENT TO EXCEPTIONS AND EXCEPTIVE ALLEGATIONS TO AMENDED LIBEL

EXHIBIT "AA"

QM189:231

September 22, 1954

File Copy

Via Air Mail

Richfield Oil Corporation

Richfield Building

Los Angeles 17, California

Attention: David Guntert, Esq.

Re: Manning Watch Overtime

Dear Mr. Guntert:

Further to our recent telephonic conversation in respect to settlement of the above-captioned matter.

Our local District Comptroller has advised that under the settlement terms agreeable to the Administration (namely, our acceptance of 100% items of overtime set forth in Article Seventh of the Second Disputes Addendum and 55% of all other overtime under the requisition time charters and your repayment of the actual amounts overpaid by the War Shipping Administration for crew overtime under the prior voluntary Maritime Commission time charters as presently audited) the amount to be paid to the Administration is \$24,247.00 plus an undetermined amount for the overpayments under the

prior MCc charters. By letter dated September 9, 1954, Mr. Halen, our District Counsel, has transmitted to you a summary sheet prepared by the Office of the District Comptroller showing calculation of the above-stated figure of \$24,247.00, in accordance with the above-stated settlement formula.

We are requesting the local District Comptroller to promptly report to us the amount due the Administration under the prior MCc charters. Mr. John Mason, our former District Counsel, has advised us that in previous discussions with you, you have indicated that about \$2,000 is in dispute under the prior charters. As soon as we have received advices from the District Comptroller as to the exact sum due under the prior charters, we shall advise you.

As I understand your counter-proposal for settlement, you are willing to offer an amount somewhere between \$20,000 and \$24,427, (sic) providing the Administration gives a complete and full release, not only of the crew overtime claims, but of all other claims in favor of the Administration against your company.

This is to advise that the Administration cannot depart from the settlement formula for two fundamental reasons. In the first place, the settlement formula is the same as has been tendered to, and accepted by, the three other West Coast oil companies against whom the Administration has similar claims. Secondly, it is not customary for the Administration to give broad releases from liability in con-

nection with the settlement of an individual claim. As you realize, the war-time operations of the chartered vessels produced a multitude of claims in behalf of both owners and the charterer. Our records indicate that in addition to the crew overtime dispute under the requisition charters and the prior MCc charters, above mentioned, the Government has a claim of \$2,087.46 covering unsettled disallowances in connection with off-hire certificates. A review of this latter item shows that a revision of this claim downward may be in order and we have requested our Comptroller's office to re-examine this item. In addition, advices received from our District Comptroller indicate that the Administration also has a claim for an undetermined amount for insurance and general average recoveries pursuant to Article Eighth of the Second Disputes Addendum. Our files also indicate that at one time you had requested a release from certain bunkering contracts, information as to which is lacking in our files. In addition to the foregoing, there may be other claims in favor of the Administration arising out of the charter operations and we are requesting our local District Comptroller to prepare a full report as to the status of all charter claims for and against the Government.

In view of the foregoing, we shall appreciate your advices as to whether or not your company is agreeable to enter into a final settlement of crew overtime claims under the requisition and prior MCc time charters in accordance with the settlement formula,

set forth above, leaving to separate settlement any other open claims between the charterer and the owner.

We trust that upon further consideration your company will determine that settlement on the above-stated basis represents a fair and reasonable disposition of the crew overtime claims of the Administration. In any event, we shall appreciate your early advices in order that we may take appropriate action in closing out the subject claims.

Very truly yours,

/s/ CLARENCE G. MORSE,

General Counsel.

JTarian/mjt

cc: 762, 200, 231, 424, 453, 20004, 204.

EXHIBIT "BB"

Richfield Oil Corporation

Richfield Building, Los Angeles 17, California

QM189

File

September 30, 1954

Clarence G. Morse, Esq., General Counsel

Maritime Administration

Department of Commerce

Washington 25, D. C.

Dear Mr. Morse:

Re: QM189:231

Manning Watch Overtime

Thank you very much for your letter of September twenty-second in which you refer to Mr. Halen's

letter of September ninth and the possibility of our accepting the compromise offer which I understand other companies have agreed to accept.

This offer has been conditioned upon an additional payment by Richfield of some \$4,000 to effect settlement of manning watch overtime under MCE charters and the dispute concerning off-hire certificates. Also we would not be able to pay under protest and sue for recovery.

Richfield is in the unique position of being the only vessel owner who has had its time charter business with the Maritime Commission and WSA renegotiated. This puts your claim against us on an entirely different footing than your claims against other operators. Additionally we have on file in the Court of Claims an action for just compensation based on the theory that the time charters and various reductions in charter rates were executed by Richfield under economic duress. That action was filed within the statutory period, and disposition of the case has not been determined pending final outcome of our negotiation for an administrative settlement of your claim.

When these operations were being renegotiated, we were allowed a profit of 25 cents per DWT per month based upon the books of account which kept on those operations and which prior to renegotiation had been audited and approved by your auditors. Had these disputed items been paid by Richfield, the amount of the Government's renegotiation

recovery would have been reduced by that same amount. It follows, therefore, that the Government has already received full payment of these claims as well as any others it might assert in the future.

We are mindful of the costs and delays involved in litigation, and we would much prefer an administrative settlement with you. It is worth something to us to get rid of these claims, to avoid litigation, and to be certain that no future claims will be asserted. Accordingly we would be willing to pay a substantial sum and dismiss our action in the Court of Claims for a complete release.

We feel, however, that under the circumstances we should not be held to the same bases upon which you have reached agreement with other operators.

May I have your advice as to whether or not you are interested in working out such a settlement.

Yours very truly,

/s/ DAVID GUNTERT,
Counsel.

DG:BP

[Stamped]: Received Oct. 4, 1954.

EXHIBIT "CC"

QM189:231

October 29, 1954

Via Air Mail

Richfield Oil Corporation

Richfield Building

Los Angeles 17, California

Attention: David Guntert, Esq.

Re: Manning Watch Overtime

Dear Mr. Guntert:

Reference is made to your letter, dated September 30, 1954, and our recent telephonic conversation in respect to the above subject.

Your above-mentioned letter states that you are mindful of the costs and delays involved in litigation, that you would much prefer an administrative settlement, and that you are willing to pay a substantial sum and dismiss your action in the Court of Claims for just compensation for a complete release.

We too are interested in an amicable, administrative settlement, particularly in view of the fact that there does not appear to be any substantial financial disparity between your company's views and the Government's position.

However, for reasons set forth in our letter of September 22, 1954, the Government is not in a position to give an over-all release. You will readily appreciate that in view of the additional claims

therein referred to, and possibly additional claims in favor of the Government yet undeveloped under the contracts in question, it is not possible for the Government to furnish such a release.

The present outstanding claims in favor of the Government, in addition to the proposed settlement for manning watch overtime in the sum of \$24,247.00 and an estimated \$2,000.00 under the prior Maritime Commission charters, include a claim for off-hire disallowances which our Comptroller's office now advises is in the sum of \$623.11, in lieu of the original figure of \$2,087.46, and an undetermined sum for insurance and general average recoveries pursuant to Article Eighth of the Second Disputes Addendum. Insofar as your reference to renegotiation is concerned, you are well acquainted with our position and the position of the Comptroller General on this subject. We have no further comments to make except to refer to the recent decision of the Court of Appeals of the Ninth Circuit in your suit against the Government in which the Court stated:

“We have considerable difficulty in perceiving just what appellant's theory may be with respect to its right to attack the renegotiation of its profits or to question the effect of the renegotiation agreement which it executed.”

In view of the foregoing, we trust that we may receive word from you that you are prepared to settle the manning watch overtime on the same settlement formula as has been reached by the Administration with the other west coast companies, leav-

ing to separate settlement any additional open claims between the parties.

Very truly yours,

/s/ CLARENCE C. MORSE,
General Counsel.

JTarian/mjt

cc: 762, 200, 231, 424, 453, 20004, 204.

Affidavit of service by mail attached.

[Endorsed]: Filed July 13, 1956.

[Title of District Court and Cause.]

ANSWER TO RESPONDENT'S EXCEPTIONS
AND EXCEPTIVE ALLEGATIONS TO
THE AMENDED LIBEL

Comes Now libelant Richfield Oil Corporation and answers respondent's Exceptions and Exceptive Allegations to the Amended Libel as follows.

Concerning Respondent's Exceptions

Respondent's sole exception is that "the allegations of the amended libel clearly show that the claim of libelant is for recovery back of a voluntary payment made by libelant as consideration for compromise and settlement of disputed claims." In support of its exception, respondent makes certain exceptive allegations and presents to the Court certain documents by which respondent hopes to establish a bar to avoid trial of the issues on their merits.

The amended libel alleges all of the elements of involuntary payment, and all of those allegations are admitted for the purpose of considering respondent's exceptions to the amended libel. [71] Moreover, verified allegations herein contained answering respondent's exceptive allegations refute those exceptive allegations in toto; show that respondent's exceptive allegations contain distortions of fact, assumptions and conclusions; and clearly show that one of the grounds establishing the involuntary nature of the payment is that the payment was made under an express reservation of the right to pay under protest and sue for recovery. This would have been proved at time of trial but is presented here in answer to the exceptive allegations.

Answer to Respondent's Exceptive Allegations

Respondent's exceptive allegations are for the most part mere conclusions and attempt to show that the original claim was \$75,000; that such claim was compromised for \$34,158.02; that libelant agreed to the compromise; that libelant paid it "voluntarily" and now seeks to recover its compromise payment.

Respondent's exceptive allegations just do not stand up for the following reasons, which are facts that will be proved at time of trial on the merits:

1. The \$75,000 figure is cited in the amended libel simply as a recitation of the history of the case. It was the estimated amount named in the complaint in a prior case brought under the Admin-

istrative Procedure Act at a time long before the audit was complete and is based upon the Maritime Administration's auditors' own estimates at that time.

2. Prior to the litigation brought under the Administrative Procedure Act, libelant had dealt primarily with the office of the District Counsel of respondent at San Francisco, but libelant's counsel had also had conferences with respondent's attorneys in Washington, D. C. When the decision of the Court of Appeals for the Ninth Circuit became final in the litigation under the Administrative Procedure Act, libelant's counsel telephoned John T. Halen, District Counsel, and advised him that libelant would not [72] appeal the decision and requested that respondent's auditors complete their audit and determine how much was actually claimed so that libelant could pay under protest and sue for recovery to prevent seizure of its funds through the offset procedure which had previously been threatened by the District Counsel's office. The amount of the claim had not previously been determined. There ensued a series of letters dated January 27, 1954, January 28, 1954, February 3, 1954, May 10, 1954, August 31, 1954, and September 9, 1954, which are marked Exhibits "N," "O," "P," "Q," "R" and "S." respectively, attached hereto and by this reference made a part hereof. The 50/50 formula referred to in said letters is the formula contained in the Second Disputes Addendum. This alternative formula contained in the Second Disputes Adden-

dum, was available to but rejected by libelant at the time it entered into an agreement with respondent to sign the Second Disputes Addendum, as alleged in the amended libel. The letter dated May 10, 1954, was the first offer to change the 50/50 split referred to in the Second Disputes Addendum to a 55/45 split and was tendered on the basis that "settlement on that basis would necessarily preclude payment under protest and recourse to the courts for recovery thereof."

3. This offer was not acceptable to libelant because, as alleged in the amended libel, libelant had made an agreement with respondent to allow overtime to stand as previously audited and because if any money were due respondent, it had been recovered in the renegotiation processes. Moreover, libelant, with the full knowledge of respondent, was seeking a means whereby all possible claims asserted then or to be asserted thereafter would be finally resolved either by a general release for a consideration or by litigation on the merits.

4. After the correspondence attached as Exhibits "N" through "S," inclusive, and Exhibits "AA," "BB" and "CC" attached to the [73] exceptive allegations, negotiations were carried on in Washington, D. C., by conferences with Clarence G. Morse, General Counsel, prior to his appointment as Administrator of the Maritime Administration and thereafter with James L. Pimper, Assistant General Counsel. These negotiations culminated in the final demand set forth in Mr. Pimper's letter of July 25,

1955, which is attached to the amended libel as Exhibit "K" thereof. Shortly before expiration of the thirty day period set forth in said letter from Mr. Pimper, counsel for libelant telephoned Mr. Pimper and advised that if respondent would recede from its position stated by the District Counsel, that payment under protest would not be accepted, libelant would pay the claim under protest to prevent the threatened offset and would institute suit to recover. This Mr. Pimper agreed to do, whereupon, reserving the right to sue for recovery, libelant made the payment under protest to prevent seizure of its property.

5. Promptly thereafter and on November 30, 1955, libelant instituted suit herein to recover the payment pursuant to the reservation of right to do so as aforesaid and upon the grounds set forth in said protest.

6. Libelant is informed and believes and therefore alleges that some of the other oil companies have indicated to the Maritime Administration that they would pay the demands made upon them but that at the time this action was filed, and as of the date hereof, so far as libelant knows, not one has paid such demand and all are awaiting the outcome of this litigation.

7. Libelant is the only one of the West Coast oil companies involved in Maritime Administration claims of the nature described in the amended libel that had entered into a settlement agreement con-

cerning the division of overtime at the time the Second Disputes Addendum was executed, and libelant is the only one of said companies involved that has had its requisition time charter [74] operations renegotiated.

Wherefore, libelant prays that respondent's Exceptions to the Amended Libel be overruled and that respondent be required to answer herein.

/s/ DAVID GUNTERT,
Proctor for Libelant.

Duly verified. [75]

EXHIBIT N

U. S. Department of Commerce
Maritime Administration
180 New Montgomery Street
San Francisco 5, California

Address reply to
Maritime Administration
and Refer to File No.
P22-2:20004

January 27, 1954

Airmail
David Guntert, Esq.
Richfield Oil Corporation
Richfield Building
Los Angeles 17, California

Dear Mr. Guntert:

Re: Manning Watch Overtime

Reference is made to your long distance telephone call of even date wherein you advised that your cor-

poration will not file an appeal from the decision handed down by the Ninth Circuit Court of Appeals.

You requested that I have certain bills on the Kekoskee revised. I regret to state, however, that I was unable to ascertain in what manner you wished these bills revised. The poor telephone connection gave me just enough information to confuse me and upon reading my notes after you had hung up, I found that I was unable to make much sense of them. I would therefore appreciate your forwarding your request in writing in order that I may begin immediate action upon the claim.

Very truly yours,

/s/ JOHN T. HALEN,
District Counsel.

cc: 40004-WFH

EXHIBIT O

January 28, 1954

Maritime Administration
180 New Montgomery Street
San Francisco 5, California

Attention of Mr. John T. Halen,
District Counsel

Gentlemen:

Re: P22-2:20004

Manning Watch Overtime

With reference to our telephone conversation Wednesday and your memorandum of the twenty-

seventh, the bills previously rendered on the Kekoskee covered an additional year's period beyond the cutoff date in May, 1944. I believe your auditors are aware of this.

The other point was that in rendering your bills in the first instance, you advised that we had the option of paying the charges as billed or paying additional charges on the basis of 50 per cent of the overtime exclusive of the 100 per cent items.

My suggestion was that your auditors compute what you consider is due on the latter basis, and upon our receipt of them, we will check them and in all probability make payment under protest as a preliminary step to suing for recovery unless some satisfactory compromise settlement based upon such revised billing can be worked out.

Yours very truly,

DAVID GUNTERT.

DG:BP

cc. Mr. Joe Weber

EXHIBIT P

U. S. Department of Commerce
Maritime Administration
180 New Montgomery Street
San Francisco 5, California

Address Reply to

Maritime Administration and Refer to File No.
P22-2:20004

David Guntert, Esq.

February 3, 1954

Richfield Oil Corporation

Richfield Building

Los Angeles 17, California

Dear Mr. Guntert:

Re: Manning Watch Overtime

Receipt is acknowledged of your letter of January 28, 1954, relative to the manning watch overtime. You have requested that our auditors review the bill rendered on the Kekoskee and compute our charges upon the basis of your company paying additional charges of 50% of the overtime exclusive of the 100% items.

Your letter has been referred to the District Comptroller's office for the above-mentioned purpose and has also been referred to Washington for their advices as to whether some satisfactory compromise settlement can be worked out.

Very truly yours,

/s/ JOHN T. HALEN,

District Counsel.

cc: 42004-H.S. w/in.ltr

cc: 4004-WFH "

cc: 230

EXHIBIT Q

U. S. Department of Commerce
Maritime Administration
180 New Montgomery Street
San Francisco 5, California

Address Reply to
Maritime Administration
and Refer to File No.
P22-2:20004

May 10, 1954

Richfield Oil Corporation
Richfield Building
Los Angeles 17, California

Attn: David Guntert, Esq.

Dear Mr. Guntert:

Re: Manning Watch Overtime

Reference is made to your letter of January 28, 1954, on the above matter, suggesting that the Administration compute what we consider is due to the Administration as the result of overpayments made to your company on Requisition Time Charters covering vessels owned by Richfield. You have suggested that this computation be made on the basis of the Administration splitting the overtime, exclusive of the 100% items, 50-50 with Richfield. You have stated that after checking these figures your company will in all probability make payment under protest as a preliminary step to suing for recovery

unless some satisfactory compromise settlement based upon a revised billing can be worked out.

I should first of all like to apologize for the long delay in replying to yours of January 28. I assure you that this delay was due to the heavy pressure of work not only upon this office but also upon our auditors.

There is enclosed herewith a summary sheet which has been compiled by the Office of the District Comptroller which contains not only the amounts that have already been paid to your company but also a computation as to the amounts the Administration considers to be due to it under the so-called 50-50 split provided for by the Second Disputes Addendum. You will note that settlement on this basis would call for a refund by your company of the sum of \$32,472.38. You will also note that this summary pertains only to an overtime study conducted on Requisition Time Charters. We are still awaiting information from Washington concerning sums due under the prior voluntary Maritime Commission Time Charters.

With respect to any other compromise settlement which may be available to your company in this matter, I am authorized by the Admiralty Counsel in Washington to advise you that the Administration is prepared to accord to your company settlement on the same terms applicable to other companies. It is expected that this settlement will be placed in final form for approval at Washington at

an early date. Under the formula or terms of the settlement the Administration will accept 100% items pursuant to the Second Disputes Addendum and all other overtime under the Requisition Time Charter is to be adjusted by the Administration assuming 55% thereof and the owner assuming 45%. The owner will also repay the actual amounts overpaid by War Shipping Administration for crew overtime under the prior voluntary Maritime Commission Time Charters as presently audited.

If your company is interested in arriving at a settlement of this matter in accordance with the aforementioned formula, I will be only too glad to forward to you a summary similar to the one enclosed but adjusted on a 55-45% basis. Settlement on that basis necessarily would preclude any payment under protest and recourse to the courts for recovery thereof.

Very truly yours,

/s/ JOHN T. HALEN,
District Counsel.

cc: 40004

cc: 43004-FA4-H.S.

cc: 231-2cc

EXHIBIT R

U. S. Department of Commerce
Maritime Administration
180 New Montgomery Street
San Francisco 5, California

Address Reply to
Maritime Administration
and Refer to File No.
P22-2:20004

August 31, 1954

Richfield Oil Corporation
Richfield Building
Los Angeles 17, California

Attn: David Guntert, Esq.

Dear Mr. Guntert:

Re: Manning Watch Overtime

Please refer to my letter of May 10, 1954, on the above matter wherein this office advised you as to the terms of settlement the Maritime Administration is prepared to accord to your company in the above matter.

My principals in Washington have advised me that formal settlement of claims involving the other companies interested in the manning watch overtime question has been held up pending receipt of advices from your company indicating whether you desire or do not desire to make a compromise settlement on the same terms. Accordingly, any information you can provide this office concerning your

probable intentions in this matter will be sincerely appreciated in order that I may advise my Washington office of the present status of negotiations.

Very truly yours,

/s/ JOHN T. HALEN,

District Counsel.

cc: 231, 40004

EXHIBIT S

U. S. Department of Commerce

Maritime Administration

180 New Montgomery Street

San Francisco 5, California

Address Reply to

Maritime Administration

and Refer to File No.

P22-2:20004

September 9, 1954

Richfield Oil Corporation

Richfield Building

Los Angeles 17, California

Attention: David Guentert, Esq.

Dear Mr. Guentert:

Re: Manning Watch Overtime

Reference is made to your long distance call of September 8 with respect to the settlement of the Manning Watch Overtime question. You will recall that at first you indicated that it was the intention of your company to request a billing from the Maritime Administration for settlement on a 50-50 basis, and that your company would pay under protest and file suit for recovery of the amount so paid.

As I indicated to you in that telephone conversation, the Administration will consider a compromise settlement on the basis that the Administration will accept 100% of the items pursuant to the second disputes addendum, and all of the other overtime under the requisition time charter to be adjusted by the Administration assuming 55% thereof, and the owner assuming 45%. Under this settlement formula the owner will also repay the actual amounts over-paid by WSA for crew overtime under the prior voluntary Maritime Commission time charters as presently audited.

I am enclosing herewith a summary sheet on Requisition Time Charter Crew Overtime Study, wherein all amounts allocated to each vessel are set forth, and wherein is set forth the figures of settlement which would be applicable on a 55-45 settlement.

You stated in your telephone call that your company might view the proposed 55-45 settlement favorably, provided the Administration could give you a complete and full release of all other claims held by the Administration against your company. As I indicated, settlement under those terms would necessarily have to be approved by Washington, this office not being authorized to handle negotiations up to that stage. In line with your suggestions, therefore, I agree that it would probably be best for you to communicate your counter proposal directly to Washington, and specifically to the General Counsel for the Maritime Administration, Clarence G. Morse, Esq.

I should like to point out, however, that I have received previous instructions from Washington that the overtime settlement would be subject to the closing of unpaid off-hire disallowances in the sum of \$2,087.46 as per billing of the District Comptroller dated June 4, 1953. If you will refer to that billing you will note that it is a composite of items applying against the SS Agwiworld (WSA 1432-R; SS Kekoskee (WSA 1468-R); SS Topila (WSA 1438-R). This would necessarily be at least one of the items which you would desire to be covered by the release mentioned in our conversation. Therefore, it would be up to my prinicpals in Washington to decide whether they would wish to accept your counter proposal.

In order to assist you in any manner possible in settling this claim, I shall immediately notify the office of the General Counsel as to the general nature of your telephone call in order that they may be more readily prepared to reply to your proposal once it has been received.

Very truly yours,

/s/ JOHN T. HALEN,
District Counsel.

Enclosure

P.S. In the event this matter is taken up with Washington directly, it will be appreciated if copies of correspondence can be made available to this office in order that our file may be kept current.

/s/ J. T. HALEN.

Summary Sheet on Requisition Time Charter Crew Overtime Study—Richfield Oil Corporation

	1	2	3	4	5	6	7	8	9	10	11
	Less Extra Complement				Amount Paid by M. A.				Col. 7 & 8 Total Paid Split + 100%	Less Amount of Manning Watch Paid in Error	MA Should Have Paid Col. 7-10
Vessel	Total O/T	Due Owner	Paid Owner	Total	Net O/T Subject to Split	55% Payable by MA	Subject to Split	Extra Comp.			
Agwiworld	\$ 29,713.84	251.17	744.16	995.33	28,718.51	15,795.18	21,701.33	744.16	22,445.49	13,283.94	8,417.39
Charles S. Jones.....	13,499.40	106.58	455.05	561.63	12,937.77	7,115.77	11,303.05	455.05	11,758.10	5,541.77	5,761.28
Huguenot	14,155.85	132.18	187.00	319.18	13,836.67	7,610.17	7,869.50	187.00	8,056.50	3,705.01	4,164.49
Kekoskee	32,713.16	394.93	403.73	798.66	31,914.50	17,552.98	21,331.38	403.72	21,735.10	11,115.26	10,216.12
Larry Doheny	5,498.55	.....	.....	.....	5,498.55	3,024.20	3,931.00	.....	3,931.00	1,855.42	2,075.58
Pat Doheny	38,411.85	368.85	757.95	1,126.80	37,285.05	20,506.78	27,241.02	757.95	27,998.97	15,691.92	11,549.10
Topila	35,363.63	348.75	698.33	1,047.08	34,316.55	18,874.10	22,951.36	698.33	23,649.69	13,351.51	9,599.85
	<u>\$169,356.28</u>	<u>1,602.46</u>	<u>3,246.22</u>	<u>4,848.68</u>	<u>164,507.60</u>	<u>90,479.18</u>	<u>116,328.64</u>	<u>3,246.21</u>	<u>119,574.85</u>	<u>64,544.83</u>	<u>51,783.81</u>

From Statement above Maritime Administration Paid \$116,338.64 of Total O/T less 100% items which is

\$116,328.64 or 70.32%

\$164,507.60

On a Correct Audit Basis Maritime Administration should have paid \$51,783.81 of Total O/T less 100% items which is

\$ 51,783.81 or 31.42%

\$164,507.60

As on a Correct Audit Basis Maritime Administration paid less than 60%. Owner can bring himself under provisions of 2nd. Disputes Addendum and claim a 50-50 split, or (on negotiation) a 45-55%

A—On a Correct Audit Basis Owner must pay manning watch of
Less Unpaid O/T due on 100% Items

\$ 64,544.83

1,602.46

\$ 62,942.37

On Amounts subject to Split, Maritime Administration Paid

116,328.64

B—On a 55-45 settlement, Maritime Administration pays 55% of \$164,507.60 or

90,479.18

Amount Overpaid

25,849.46

Less Amount due Owner on 100% unpaid items

1,602.46

Amount due Maritime Administration under Requisition Charter Settlement

\$ 24,247.00

Receipt of copy acknowledged.

[Endorsed]: Filed August 20, 1956.

desired Libelant might file an amended Libel, and the Proctor for Libelant advising that upon stipulation of the parties the exceptions and exceptive allegations and the answer of Libelant to the exceptions and exceptive allegations would be a part of the record on appeal that Libelant did not desire to file an Amended Libel.

Now Therefore It is Hereby Ordered, Adjudged and Decreed that the exceptions of Respondent to the Amended Libel be, and the same are hereby sustained, and the Amended Libel be, and the same is, hereby dismissed.

Dated: August 27, 1956.

/s/ BEN HARRISON,

United States District Judge.

Approved as to form:

/s/ DAVID GUNTERT,

Proctor for Libelant.

[Endorsed]: Filed August 27, 1956.

Docketed and entered August 28, 1956. [102]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the respondent, the United States of America, and its proctors, Laughlin E. Waters, United States Attorney; Max F. Deutz, Assistant United States Attorney; and Keith R. Ferguson, Special Assistant to the Attorney General:

Notice is hereby given that Richfield Oil Corporation, the libelant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Decree Dismissing Amended Libel herein entered on the 28th day of August, 1956.

/s/ DAVID GUNTERT,
Proctor for Libelant.

[Endorsed]: Filed September 17, 1956. [103]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Libelant-Appellant herein presents the following points upon which it claims the Court erred:

1. In granting respondent's Exceptions to the Amended Libel.
2. In dismissing the Amended Libel.

/s/ DAVID GUNTERT,
Proctor for Libelant-Appel-
lant.

[Endorsed]: Filed September 17, 1956. [104]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 106, inclusive, contain the original

Amended Libel in Personam;

Exceptions and Exceptive Allegations to the Amended Libel;

Exhibits "AA2," "BB," "CC," for Attachment to Exceptions and Exceptive Allegations to Amended Libel;

Answer to Respondent's Exceptions and Exceptive Allegations to the Amended Libel;

Decree Dismissing Amended Libel;

Notice of Appeal;

Statement of Points on Appeal;

Designation of Contents of Record on Appeal;

all, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which has been paid by appellant.

Witness my hand and seal of the said District Court this 24th day of September, 1956.

[Seal]

JOHN A. CHILDRESS,

Clerk,

By /s/ CHARLES E. JONES,

Deputy.



[Endorsed]: No. 15296. United States Court of Appeals for the Ninth Circuit. Richfield Oil Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 25, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

Filed for
trial of the
United States
District Court
Southern District
of New York
Appellate
Division
[Emerson]

Clerk of
the Court

No. 15296
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHFIELD OIL CORPORATION,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

DAVID GUNTERT,

555 South Flower Street,
Los Angeles 17, California,

Attorney for Appellant.

FILED

NOV 26 1956

PAUL P. O'BRIEN, C



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No. 15296

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHFIELD OIL CORPORATION,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement as to Jurisdiction.

This is an appeal under Section 1291 of Title 28 of the United States Code (62 Stat. 929) from a decree [R. 55] sustaining respondent's exceptions [R. 27] to the amended libel [R. 3-26] and dismissing the amended libel in an action entitled "Richfield Oil Corporation, Libelant, vs. United States of America, Respondent," being in Admiralty No. 19103-BH in the District Court of the United States in and for the Southern District of California, Central Division, hereinafter referred to as "the case below."

This Court has jurisdiction under and pursuant to Section 1291 of Title 28 of the United States Code (62 Stat. 929).

As shown by the amended libel and pleaded therein [R. 4] the District had jurisdiction in the case below under and pursuant to Section 2 of the Act of March 9, 1920, commonly known as the Suits in Admiralty Act (41 Stat. 525; 46 U. S. C. A. 742).

Statement of the Case.

On August 26, 1955, appellant, libelant in the case below (hereinafter called libelant), paid \$34,158.02 under protest to appellee, respondent in the case below (hereinafter called respondent) [R. 18-19], and on November 30, 1955, libelant brought suit against respondent under the Suits in Admiralty Act [R. 4] to recover said sum of money. Respondent filed exceptions to the libel urging dismissal on the ground that the allegations showed a voluntary payment and on the further ground that the two-year statute of limitations barred recovery. In May, 1956, the Court sustained the exceptions to the libel with leave to amend, thereby impliedly overruling respondent's contention that the two-year statute of limitations barred recovery.

The amended libel [R. 3-26] was filed on June 4, 1956, and expressly alleged facts showing that payment was made to prevent seizure of property and to prevent injury to business [R. 13]. Respondent filed exceptions thereto [R. 27] asking dismissal of the amended libel on the sole ground that "the claim of libelant is for recovery back of a voluntary payment made by libelant as consideration for compromise and settlement of disputed

claims.” Respondent also filed verified exceptive allegations including Exhibits “AA,” “BB” and “CC” [R. 27-38]. Libelant filed verified answers to the exceptive allegations [R. 38-43] supported by Exhibits “N” through “S” [R. 43-54].

On August 27, 1956, upon stipulation that the exceptions, the exceptive allegations and answering allegations would all be considered part of the record on appeal, libelant declined to plead further and the Court sustained the exceptions to the amended libel and entered its decree dismissing the amended libel [R. 55-56].

On September 17, 1956, due notice of appeal and statement of points on appeal were filed by libelant.

The sole question presented to the Court on appeal is whether the amended libel, as supplemented by the verified answers to the exceptive allegations, alleges “a voluntary payment made by libelant as consideration for compromise and settlement of disputed claims,” as contended by respondent, or alleges an involuntary payment made to prevent seizure of property and injury to business interest and/or a payment made under an express reservation of right to sue for recovery, as contended by libelant.

The facts upon which that question is to be decided are as follows:

Libelant, a Delaware corporation [R. 3], as owner of certain tank steamships [R. 4-5], chartered the same to respondent under the latter’s World War II requisitioning

program and operated said tankships for respondent as the latter's time charter agent. During the course of such operations certain disputes arose between the parties as to the overtime and other charges allowed libelant as owner and the charter hire to be paid libelant. As a result of these disputes, libelant and respondent entered into a written agreement settling the overtime question on the basis of the overtime as charged and paid for and reflected upon the books, records and accounts maintained by libelant for respondent and supervised and audited by respondent [R. 9].

Subsequently, respondent subjected these operations to renegotiation, and in such renegotiation allowed libelant to retain 25 cents per DWT per month and recaptured all profits in excess thereof then shown by the said audited books, records and accounts. The parties entered into Renegotiation Agreements, as alleged in the amended libel [R. 14-16] under which respondent agreed not to reopen its determination of excessive profits except under facts involving fraud which is not applicable herein.

Notwithstanding the agreement as to the overtime split, as alleged in the amended libel [R. 9] and the agreements set forth in the Renegotiation Agreements [R. 14-16], respondent, some three years after the last vessel was redelivered, re audited the books, records and accounts and notified libelant that certain overtime and other charges as shown therein and previously approved and accepted by respondent would be charged back to libelant [R. 10-13, 16-17], and libelant was informed that unless

the same were paid, the amount claimed would be offset against sums due libelant under supply contracts [R. 12, and Ex. "K" at R. 24].

Libelant sought to prevent the offset by suit under the Administrative Procedure Act but the case was dismissed for want of jurisdiction [R. 11].

Libelant then sought a settlement of the claims on the basis that respondent would give libelant a general release so that the wartime operations could be finally closed [Ex. "BB" at R. 35 and Ex. "S" at R. 52]. This respondent rejected and insisted that libelant make the payment demanded and waive its right to sue for recovery [Ex. "BB" at R. 34 and Ex. "Q" at R. 48]. Libelant refused to do this and finally Mr. Pimper, the Assistant General Counsel of the Maritime Administration, agreed to accept payment under protest with the understanding that libelant would promptly sue for recovery so that the question of liability could be judicially determined [R. 42]. Such payment was made by libelant under an express reservation of right to sue for recovery [R. 42] and such payment was made by libelant to prevent seizure of libelant's property [R. 13 and 42] and to prevent serious injury to libelant's business and reputation [R. 13].

The pleadings clearly show that libelant was determined to have a judicial determination of the validity of respondent's claim. Libelant first attempted this under the Administrative Procedure Act [R. 11]. That case was

dismissed for want of jurisdiction. Libelant also filed an action in the Court of Claims, which it agreed to dismiss if settlement would be reached [Ex. "BB" at R. 35]. The Court is asked to take judicial notice of the fact that the Court of Claims case was dismissed on or about September 21, 1955, shortly after payment was made under protest with the reservation of right to sue for recovery pursuant to an understanding with respondent's counsel [R. 42].

Specification of the Errors.

The District Court erred in the following respects:

1. In sustaining respondent's exceptions to the amended libel [R. 56]; and
2. In dismissing the amended libel [R. 56].

Summary of Argument.

POINT I.

THE TRUTH OF THE ALLEGATIONS IS ADMITTED FOR THE PURPOSE OF THIS APPEAL.

It is well settled that in considering an exception to a libel in admiralty, as in the case of a motion to dismiss in a civil action, the truth of the allegations is admitted. The allegations before the Court show a payment under duress and compulsion to prevent seizure of property and injury to business interest. The allegations also show payment under protest with an express reservation of the right to sue. Such a payment is involuntary and may be recovered.

POINT II.

THE PAYMENT SOUGHT TO BE RECOVERED WAS MADE INVOLUNTARILY AND MAY BE RECOVERED BACK.

The strict rule of voluntary payment has been substantially relaxed. It is now well settled that a payment made with full knowledge of the facts but for the purpose of preventing seizure of the payor's property by summary proceeding or to prevent business injury or inconvenience is not a voluntary payment and may be recovered back. More specifically, the rule of voluntary payment does not apply to payments made to prevent actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, for which the latter has no other immediate means of relief than such payment. Libelant may therefore maintain this action.

POINT III.

LIBELANT HAD THE RIGHT TO CHOOSE THE LESSER OF TWO EVILS.

It is well recognized that a party under duress has the right to choose the lesser of two evils; in other words, to take the course of action which to him seems best for himself. Here libelant was under the threat of having respondent's claim collected summarily by the seizure of monies due libelant. Libelant had the choice of either paying the claim and suing for recovery or awaiting the seizure of its property and suing for recovery. The latter course would have resulted in substantially greater

expense to libelant and would have injured its business reputation. Its choice of the lesser of the two evils did not make the payment a voluntary payment and libelant may recover the payment so made.

POINT IV.

THE PAYMENT WAS MADE UNDER AN EXPRESS RESERVATION OF RIGHT TO SUE FOR RECOVERY.

It is well settled that the payment of a claim made under protest and under an express reservation of the right to sue for recovery is not a voluntary payment and may be recovered. The record clearly shows that libelant was determined to have a judicial determination of the validity of respondent's claim, whereas respondent was seeking payment of its claim without giving libelant the right to pay under protest and sue for recovery. This libelant refused to do and payment was not made until after respondent's counsel agreed to accept payment under protest with the knowledge, understanding and agreement that libelant reserved the right to sue for recovery.

Relying on that agreement, libelant paid under protest, dismissed its suit in the Court of Claims, and brought this action for recovery of the payment made under protest. Such a payment is not a voluntary payment and libelant may recover the payment so made. Libelant should have its day in court to prove its allegations.

ARGUMENT.

POINT I.

The Truth of the Allegations Is Admitted for the Purpose of This Appeal.

No citation of authority is needed for the proposition that in considering an exception to a libel in admiralty, as in the case of considering a motion to dismiss in a civil action, the truth of the allegations is admitted. It is also well settled that in filing an exception to a libel the use of exceptive allegations and answers thereto are also proper.

Benedict on Admiralty (6th Ed.), Vol. 2, p. 56;
Sword Line v. United States, 228 F. 2d 344.

Here the parties have stipulated that the exceptions, the exceptive allegations, and the answers to the exceptive allegations are all a part of the record on appeal. It follows, therefore, that libelant's allegations appearing in the libel and in the answers to the exceptive allegations must be accepted as true for the purpose of this appeal.

The facts alleged show a wrongful and unlawful demand by respondent which had the power, without resort to a suit where libelant could defend itself, to similarly seize property of libelant and to injure libelant's business interest. The facts alleged show a threat by respondent to exercise that power unless libelant paid said demand and compliance by libelant to prevent such seizure and injury. It was error therefore to dismiss the amended libel.

POINT II.

The Payment Sought to Be Recovered Was Made Involuntarily and May Be Recovered Back.

It is well settled that a payment voluntarily made with full knowledge of the facts may not be recovered back.

Chesebrough v. United States, 192 U. S. 253, 48 L. Ed. 432 (1904);

Union Pacific R. Co. v. Bd. of County Commissioners, 198 U. S. 541, 25 L. Ed. 196 (1879).

But the harsh rule of these cases has long since been relaxed.

Robertson v. Frank Bros. Co., 132 U. S. 17, 33 L. Ed. 236 (1889);

Thompson v. Deal, 92 F. 2d 478 (C. A. D. C., 1937);

Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751 (1920);

Southern Pacific Co. v. United States, 268 U. S. 263, 69 L. Ed. 947 (1925);

40 Am. Jur. 826-827, Secs. 163-164; 831, Sec. 171.

In the *Robertson* case the Supreme Court on page 238 applied the "prudent business man" rule and on page 239 said:

"In our judgment the payment of money to an official, as in the present case, *to avoid an onerous penalty*, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one." (Emphasis added.)

In that case the penalty involved was one or two hundred dollars. Here the added expense is several thousand dollars.

In the *Thompson* case the Court said at page 485:

“We think it is manifest from what is said in the case just cited [*Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U. S. 280, 56 L. ed. 436, 1912] that the question of whether a payment is vountary or involuntary has been in large measure relieved of the artifical tests formerly applied by some courts.”

In the *Ward* case at page 24 the Court said:

“It is a well-settled rule that ‘money got through imposition’ may be recovered back; and, as this court has said on several occasions, ‘the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.’”

As shown by the *Southern Pacific* case the requirement today is that the claimant so conduct himself as not to mislead the Government into believing that he was not asserting any further claim. In the *Southern Pacific* case at page 267 the Court said:

“We conclude that the indorsement of these protests on the vouchers sufficiently notified the government officers that *the payment of the land-grant rates was not accepted in final settlement* of transportation claims, and that as to such vouchers, the government has not established an acquiescence in the payment of the land-grant rates which discharges the claims for the remainder of the full tariff fares.” (Emphasis added.)

In the case now before this Court the respondent knew of libelant's position and agreed to accept payment under

protest with knowledge that libelant reserved the right to sue for recovery. That certainly was not misleading.

It is abundantly clear that respondent has been fully informed all along that libelant challenged the propriety of the charges and intended to seek judicial determination of their validity. That is more than sufficient under the authority of *Southern Pacific Co. v. United States, supra*, to sustain the amended libel herein.

There, as here, an unjust enrichment resulted, and here the Court, as it did in the *Southern Pacific* case, should give the injured party its day in court.

See 40 American Jurisprudence 826, Section 163, and also see 40 American Jurisprudence 826-827, Section 164, which reads in part as follows:

“However, as already has been noted, the strictness of the common-law rule has been greatly relaxed, and when concessions are exacted through one’s necessity, to save his property, illegally withheld by another, from destruction or irreparable injury, the transaction may be avoided on the ground of compulsion, although not amounting to technical duress.” (Citing *Harris v. Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913A, 1350.)

“Money paid under practical compulsion has in many cases been allowed to be recovered, as, for example, payment made to obtain goods wrongfully detained; * * *

See also 40 American Jurisprudence 831, Section 171, which applies the “prudent business man” rule, stating that where “in equity and good conscience the receiver should not retain, the payment may be recovered.”

But even if there were no relaxation of the harsh rule of voluntary payment all of the authorities recognize an exception where, as here, the payment is made to prevent seizure of the payor's property by summary proceeding or to prevent injury to his business interests.

Chesebrough v. United States, supra;

Union Pacific R. Co. v. Bd. of County Commissioners, supra;

Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor,
223 U. S. 280, 56 L. Ed. 436 (1912);

Union Pacific R. Co. v. Public Service Commission of Mo., 248 U. S. 67, 63 L. Ed. 131 (1918);

Altwater v. Freeman, 319 U. S. 359, 87 L. Ed. 1450 (1943);

District of Columbia v. American Security & Trust Co., 202 F. 2d 21, 22 (C. A. D. C., 1953).

In the *Atchison* case Mr. Justice Holmes overruled the Government's contention that the payment under protest was voluntary, saying at page 285:

“Of course, we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defense; *but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if at the same time, the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disad-*

vantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.” (Emphasis added.)

Precisely the same situation is presented here. Respondent was about to seize property through a summary procedure where libellant could not enter any defense.

The *Atchison* case and the later *Union Pacific* case were cited with approval by the Court in the *Altwater* case. Moreover, the earlier *Union Pacific* case was not followed in the later *Union Pacific* case nor in the *Atchison* case. This failure to follow the earlier *Union Pacific* case was expressly noted in January, 1953, by the Court of Appeals for the District of Columbia in the *District of Columbia* case, *supra*, where the Court not only cited the *Atchison* case and the later *Union Pacific* case with approval, but cited the earlier *Union Pacific* case with disapproval and expressly overruled one of its prior decisions based thereon. In the *District of Columbia* case the Court quoted with approval from the decision below as follows at page 22:

“ ‘Obviously plaintiff could not afford to run the risk of being publicized as a tax delinquent or of having its property distrained.’ The payments were therefore involuntary in the legal sense. ‘To say that a man who pays money must be held to have acted freely unless he did it under pressure of *immediate* and *urgent necessity*, suggests a high standard of pluck and manhood, but in transactions with the Government it is not a fair and reasonable test. When a demand is made by an official, known to have at his back, even though he may not threaten to use them, the penalties of law, the individual citizen does not stand on an equal footing * * *.’ ” (Emphasis supplied by the Court.)

We submit that there is a striking similarity between the situation there considered and here presented. There, as here, summary seizure of property was threatened and the reputation of the payor was at stake. Additionally, in this case libelant would have been put to substantial extra expense and legal disadvantage.

The amended libel clearly alleges an involuntary payment to prevent summary seizure of property and to prevent substantial injury to a business interest. Under the foregoing authorities the trial court should have overruled the exceptions to the amended libel and tried the case on its merits.

POINT III.

Libelant Had the Right to Choose the Lesser of Two Evils.

In this case libelant was under respondent's threat to collect its claim by seizing monies due libelant for merchandise furnished under supply contracts, thereby putting libelant at great legal and business disadvantage. Libelant had the choice of paying the claim and suing for recovery in the admiralty court or of allowing its property to be seized and then suing in the Court of Claims for recovery. In libelant's opinion the first course was the lesser of two evils for it was far less expensive, did not tarnish libelant's record as a supplier of products, and the case would be tried in a forum learned in admiralty.

Libelant had the unquestioned right to choose the lesser of the two evils as it saw them, and the fact that it chose according to its own best interest does not exclude duress

nor change the payment from an involuntary payment to a voluntary payment.

Union Pacific R. Co. v. Public Service Commission of Mo., supra.

In the *Union Pacific* case the Court said at page 70:

“Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.”

See also:

Robertson v. Frank Bros. Co., supra;

40 Am. Jur. 827 (Sec. 166), 828 (Secs. 167, 168), 831 (Sec. 171), 904 (Sec. 298);

17 Am. Jur. 878 (text and footnote 7), 879 (text and footnote 19).

40 American Jurisprudence 826, Section 164, reads in part as follows:

“It is firmly established that money paid to prevent an illegal seizure of person or property may be recovered.”

Citing among others,

Lamborn v. Dickinson County, 97 U. S. 181, 24 L. Ed. 926.

40 American Jurisprudence 827-828, Section 166, reads in part as follows:

“To constitute duress, which will render a payment involuntary, *it is sufficient if the will is constrained by the unlawful presentation of a choice between comparative evils, as inconvenience and loss by the*

detention of personal property, loss of property altogether, or compliance with an unconscionable demand.”

We submit that in this case the precise situation was presented. As pleaded in the amended libel, libelant would have been put to greater legal and financial inconvenience and would have suffered business damage if it had failed to pay the demand. Moreover the respondent's demand under the circumstances of this case was unconscionable. Libelant's exercise of its right to choose did not render its payment voluntary and preclude a suit for recovery thereof.

See also 40 American Jurisprudence 828, Section 167, and *Loneragan v. Muford*, 148 U. S. 581, 37 L. Ed. 569, and Section 168 which reads in part as follows:

“As a general rule, whenever a demandant is in position to seize or detain the property of him against whom the claim is made without a resort to judicial proceedings, in which the party may plead, offer proof, and contest the validity of the claim, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered.”

That is precisely the situation presented to the Court in this case. By the common practice of offset, respondent was in a position to seize and detain the property of libelant without resort to judicial proceedings. Libelant would have been required to go into the Court of Claims and sue for payment for the products delivered, and in the Court of Claims the respondent would have asserted that the sum was not due and the Court of Claims would have been the tribunal deciding this admiralty case.

As pleaded in the amended libel, the Court of Claims proceeding would have been more inconvenient and far more expensive than the proceeding in this case. Moreover, it would have entailed tarnishing libelant's record in its relations with the Federal Government. Furthermore there is substantial legal doubt that the Court of Claims would exercise jurisdiction over an admiralty matter.

Under the circumstances, all of the authorities agree that libelant's exercise of its choice in the matter did not render its payment voluntary so as to preclude a suit for recovery.

It was error for the Court in the case below to dismiss the amended libel.

POINT IV.

The Payment Was Made Under an Express Reservation of Right to Sue for Recovery.

Respondent was pressing an illegal claim. Libelant as early as January 28, 1954, had indicated in writing that it was willing to pay the claim if its validity could be judicially determined [R. 45]. Respondent at first refused to agree to a payment under protest with reservation of the right to sue for recovery [R. 34 and 49] but later agreed to accept payment under such circumstances [R. 42]. It was not until this agreement was reached that libelant made the payment under protest on August 26, 1955, moved to dismiss its suit in the Court of Claims on September 14, 1955 (the Court is asked to take judicial notice of this fact), and filed its first libel on November 30, 1955, to recover the payment made under protest.

Such a payment may be recovered in a suit brought for that purpose.

United States v. Ohio Oil Co., 163 F. 2d 633 (C. A. 10, 1947), cert. den. 333 U. S. 833;

In re New York, O. & W. R. Co., 178 F. 2d 765 (C. A. 2, 1950);

Empire Engineering Co. v. United States, 59 Ct. Cls. 904 (1924);

Lobit v. Marcoulides, 225 S. W. 757 (Tex. 1920);

Replogle v. Ray, 48 Cal. App. 2d 291 (1941).

In the *Ohio Oil Co.* case, although reversed on other grounds, the Court said at page 637 concerning the Government's attempt to defeat the claim on the ground that the payment was voluntarily made and therefore not recoverable:

"The argument seems to be that the Ohio was not required to pay the funds, but could have awaited the threatened suit to cancel the lease, and there interposed as a defense the issues which form the basis for this suit.

"No doubt the Ohio could have pleaded its construction of the lease as a valid defense to a suit for cancellation. See *Bell Oil & Gas Co. v. Wilbur*, 60 App. D. C. 256, 50 F. 2d 1070. But the remedy thus afforded is in no wise exclusive of the remedy asserted here. The action to enjoin the Secretary of the Interior from instituting proceedings to cancel oil leases in the Bell case failed because the plaintiff had an adequate remedy at law. *The availability of the remedy suggested by the Government certainly does not preclude the Ohio from paying the funds under protest and bringing suit to recover on the theory that they were exacted under a misconstruction of the contract between the parties.*

“The fact that the funds were paid under protest does not lessen the coercive effect of the demands, nor change the nature of the lawsuit. The Ohio was put to the choice of defying the asserted authority of the Secretary and awaiting the institution of a threatened suit to cancel, or to follow the more amicable course of making a *payment under protest upon the condition that it would be repaid if not owing. It is laudable for the Government, acting in its proprietary capacity, to agree with its contracting citizens to submit their differences for judicial determination.* Such conduct should be encouraged and not viewed with a critical eye. We conclude that the payment of the funds by Ohio would not, in the circumstances, preclude it from maintaining this suit to recover.” (Emphasis added.)

It is contrary to the public policy announced in the *Ohio Oil Co.* case to permit the Government to successfully contend that the payment was voluntary after it agreed to accept payment under protest with full knowledge and agreement that libelant was reserving the right to sue for recovery.

In the *New York, O. & W. R. Co.* case an action was brought to recover overpayments, and the Government sought dismissal on the grounds that the payments were voluntarily made and could not be recovered. The trial court sustained the Government but was reversed in a *per curiam* decision, the Court saying at page 766:

“In the case at bar there was not merely a payment under protest, but a payment conditioned upon the right of the petitioner to a review of all of the trustees’ bills and ‘*with the understanding that to the extent that such review shall determine there is any moneys due and owing by the Trustees, you will comply with such order as the Court may issue in*

connection with our petition.' *This was a plainly conditional and not a voluntary payment and it entitled the petitioner to a judicial review of any obligation it was claimed to have been under to make the payment.* Such a treatment of the transaction seems to be required under the decisions of the New York Court of Appeals in *Nassoïy v. Tomlinson*, 148 N. Y. 326, 331, 42 N. E. 715, 51 Am. St. Rep. 695, and *Hudson v. Yonkers Fruit Co.*, 258 N. Y. 168, 171, 179 N. E. 373, 80 A. L. R. 1052. See also *Restatement Contracts Sec. 420.*" (Emphasis added.)

In the *Empire Engineering Co.* case the plaintiff contracted with the Army Engineers for certain dredging work. The Chief of Engineers had approved certain delays which the Comptroller General disallowed on the grounds that the contracting officer had no authority to approve them; whereupon, the plaintiff was requested to pay and paid the \$953.03. The question was whether the payment was made voluntarily, and at page 906 the Court said:

"In order to avoid embarrassment by said officer by reason of said payment or *possible deduction from moneys thereafter to become due to plaintiff from the United States* or a possible suit against claimant by the United States, plaintiff paid said sum of \$953.03 to said district engineer officer with a statement that such amount was paid without waiver by plaintiff of its right to recover the same by suit in the Court of Claims or elsewhere." (Emphasis added.)

A similar situation is presented here. Respondent knew libellant was reserving the right to sue for recovery and agreed to accept payment under protest under that condition.

In the *Lobit* case an action was brought to recover some \$5,700 paid under protest with the express understanding and agreement that such payment would not affect the payor's right to sue for recovery. The jury found that the payment was not due. The claim was made that the payment could not be recovered because it had been voluntarily made. Concerning this, the Court said at page 762:

"We think the question of appellees' right to recover the money which, under the finding of the jury, appellants were not entitled to demand of them is relieved of all doubt by the express terms of the release and receipt executed by appellants when the money was paid by appellees. The release receipt recites that the sum paid by appellees to obtain the release of the judgment was paid under protest; 'they claiming no sum due thereon, and without prejudice to their right, if any, to bring suit therefor.'"

This notation shows that the payee knew the payor was reserving the right to sue for recovery. That is exactly the situation here.

In the *Replogle* case there was an understanding between the parties that a joint payment by them of a settlement with the Air Way Company would not be determinative of their respective individual rights as against each other. At page 303 the Court said that at the time of the Air Way settlement plaintiff's and defendant's attorneys had agreed that settlement of all matters between them would await their return to California. And at page 307 the Court said:

"* * * that *it was agreed* between the parties at the time of said settlement that their respective claims which were made the subject of this litigation should be reserved for future adjustment and settlement * * *." (Emphasis added.)

It does not appear that these agreements were in writing, but the Court said at page 308:

“Furthermore there was an agreement between the parties at the time of payment, that the rights between the parties would be reserved for future settlement. *This constituted an express reservation of the right to recover any sums due and the doctrine of voluntary payment is inapplicable* (48 C. J. 741).” (Emphasis added.)

Such an agreement is alleged here and libelant should have the opportunity of proving the allegation at time of trial.

See also 70 Corpus Juris Secundum, Section 144, which states at page 349:

“*Reservation of rights.* A payment made with the express reservation of the right to recover it by suit has been held to authorize a recovery thereof.”

And 70 Corpus Juris Secundum, Section 153, where it is stated at pages 360-361:

“Where a receipt taken for the money paid expressly states that the payment is under protest and does not defeat the right to sue and recover the money, it may be recovered back regardless of whether or not the facts amount to payment under duress.”

The allegations considered by the trial court show clearly that respondent accepted payment under protest with full knowledge of and agreement that libelant reserved the right to sue for recovery. It was error to sustain the exceptions and dismiss the amended libel.

Conclusion.

For the purpose of this proceeding the allegations of libelant appearing in the record are admitted as true.

Those allegations show clearly (1) that respondent made an unlawful demand upon libelant and threatened to seize libelant's property if libelant did not pay; (2) that libelant had the choice of acceding to that demand and suing for recovery or of allowing seizure to take place and suing in the Court of Claims for funds due it under its supply contracts; (3) that libelant decided to pay under protest and sue for recovery and did pay under protest under an express reservation of the right to sue for recovery; (4) that such payment was made under protest to prevent the seizure of libelant's funds in the hands of other departments of the respondent and to prevent serious business disadvantage.

Payment under those circumstances was made involuntarily, and under the law libelant is entitled to sue for recovery.

It was, therefore, error for the Court in the case below to sustain the exceptions to the amended libel and to dismiss the amended libel. We urge that this Honorable Court reverse the trial court and remand the case for trial on its merits.

Respectfully submitted,

DAVID GUNTERT,

Attorney for Appellant.

No. 15,296

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHFIELD OIL CORPORATION, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Southern District of California,
Central Division.

BRIEF FOR APPELLEE.

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No. 15,296

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHFIELD OIL CORPORATION, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the Southern District of California,
Central Division.**

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court rests upon 28 U.S.C. 1291 by reason of a notice of appeal filed September 17, 1956 (R. 56-57), from the decree of the United States District Court for the Southern District of California, (R. 55-56)¹ Honorable Ben Harrison, United States District Judge, sustaining, without opinion, the Government's exceptions and dismissing the libel.

¹An appeal by libelant from a prior related case was determined by this Court in 207 F. 2d 864.

The jurisdiction of the District Court was invoked under the Suits in Admiralty Act (46 U.S.C. 742) by an amended libel (R. 3-25), which sought recovery of \$34,158.02, alleged to have been obtained by duress in connection with the settlement of claims arising from charters of libelant's vessels during World War II. The Government's exceptions and exceptive allegations which were sustained by the District Court, alleged that the libel failed to state a cause of action because the libel alleged a voluntary payment made by libelant to obtain the benefit of a compromise settlement of disputed claims (R. 27-38).

QUESTIONS PRESENTED.

1. Whether under the allegations and exhibits of the amended libel Richfield may prove an asserted prior telephonic agreement that it could make payment of the Government's compromise offer under protest and sue to recover it back.

2. Whether payment by Richfield of the Government's compromise offer was under duress, and hence recoverable, where alleged to be induced by the Government's threat of withholding, offset and litigation.

COUNTERSTATEMENT OF THE CASE.

Pursuant to Rule 18(3) of this Court, the Government presents the following counterstatement of the case because it controverts libelant's statement as

unsupported by the record in respect of the alleged reservation of rights and duress.

This Court, in its opinion in the previous case, (207 F. 2d 864) has fully reviewed the transactions from which the instant litigation arose: the charter agreements (207 F. 2d at 866), the renegotiation contract (p. 867), the reaudit by the Maritime Commission (p. 867) and the claim approximating \$75,000 which was originally asserted by the Government (p. 868). On the basis of these facts, this Court held that the Government's threats of withholding and setoff or litigation did not constitute duress (pp. 870-871). It is sufficient to summarize the subsequent settlement negotiations, expressly embodied in correspondence between counsel for Maritime and Richfield and to contrast the actual texts of the letters exhibited with the pleadings with the allegations and assertions by libelant in its brief.

THE CORRESPONDENCE EXHIBITED WITH THE PLEADINGS.

On January 27, 1954, counsel for libelant advised Maritime that it would not appeal this Court's decision (Exhibit N, R. 43-44). By letter dated January 28, 1954 he stated that after checking the Maritime auditor's figures, Richfield would "in all probability make payment under protest as a preliminary step to suing for recovery unless some satisfactory compromise settlement based upon such revised billing can be worked out" (Exhibit O, R. 44-45).

By letter dated May 10, 1954, Maritime's district counsel replied offering compromise on the same 55-45 percent formula applicable to other companies. The letter concluded: "Settlement on that basis necessarily would preclude any payment under protest and recourse to the courts thereof." (Exhibit Q, R. 47-49.) Relative to the proposed compromise on these terms, Maritime's district counsel sent supplemental letters on August 31, 1954 and September 9, 1954 (Exhibits R and S, R. 50-53).

Maritime's General Counsel Morse, at Washington, by letter dated September 22, 1954, advised Richfield's counsel that his company's counterproposal for settlement for some amount between \$20,000 and \$24,427 in exchange for a complete release by the Government of all claims was unacceptable (Exhibit "AA", R. 30-31). Richfield's proposal was rejected on two grounds: first, Maritime's settlement formula had already been accepted by the three other West Coast oil companies against which Maritime had similar claims; second, it was not customary for the Government to give broad releases from liability in connection with the settlement of an individual claim.

Richfield's counsel replied by letter dated September 30, 1954, admitting (presumably in the light of this Court's decision at 207 F. 2d 870) "we would not be able to pay under protest and sue for recovery." After stating Richfield's preference for an administrative settlement, he concluded: "Accordingly we would be willing to pay a substantial sum and dismiss

our action in the Court of Claims for a complete release." (Exhibit "BB", R. 34-35.)

Maritime's General Counsel Morse replied on October 29, 1954, repeating interest in an amicable settlement and reiterated that the Government was not in a position to give an overall release. Reference was made to this Court's opinion in Richfield's prior case as disposing of the company's contention as to renegotiation. Richfield's counsel was requested to advise whether he was prepared to adopt the compromise reached with the other West Coast companies (Exhibit "CC", R. 36-38).

Settlement negotiations came to a head when Maritime's General Counsel, by letter dated July 25, 1955 (Exhibit K, R. 21-24), rejected Richfield's offer to pay \$20,000 in full settlement of all claims and refused to depart from the common terms of settlement offered to and accepted by the other West Coast oil companies against which the Government had similar claims. The alleged duress relied upon by Richfield is founded on this July 25, 1955, letter of Government counsel which concluded (R. 24):

Accordingly, unless we receive word from your company within 30 days that you are prepared to accept settlement of the manning watch overtime on the 55-45 formula agreed to by the other West Coast oil companies and to accept the other WSA charter claims of the Administration in the above-mentioned total sum of \$34,-158.02, *the Administration will have no other recourse except to institute suit or effect set-off*

against sums due your company from the Government as may be appropriate. [Emphasis supplied]

Richfield's counsel replied by letter, dated August 26, 1955 (Exhibit K, R. 18-21) enclosing Richfield's check for \$34,158.02, representing "payment under protest" of the Government's claim. Payment was protested on various grounds, all of which were before this Court on the prior appeal (207 F. 2d 864) (Exhibit K, R. 18-21).

No statement was ever made in the letters that the payment under protest was being made on the condition that the Government agree that Richfield might sue to get it back contrary to this Court's holding at 207 F. 2d 870. The foregoing letters, which were carefully drafted by the lawyers for each side, provide an *accurate and contemporaneous picture of what actually transpired* at the time of the payment under protest. These indisputable documents in the record are to be contrasted with the contrary allegations and assertions more recently made by Richfield in its opening brief in this Court and in certain conclusionary assertions in its amended libel.

RICHFIELD'S AMENDED LIBEL.

The amended libel's first cause of action alleges the transactions, already reviewed in this Court's opinion (207 F. 2d 864) which gave rise to the instant litigation: the charter parties (R. 5), the disputes

as to overtime (R. 6-8) the reaudit by the Government (R. 10), and Maritime's original claim against Richfield approximating \$75,000. After reference to this Court's previous decision (R. 11), the libel relates the settlement negotiations (R. 11), the Government's demand of payment in full, and the alleged threat that if payment was not made within 30 days the sums would be recovered "by the employment of the summary procedure of offset or an [sic] institution of litigation" (R. 12). It then alleges that under compulsion of the Government's "coercion, duress and threats," and "for the purpose of preventing such seizure of its property" Richfield paid under protest, as evidenced by its letter of August 26, 1955 (R. 13).

The second cause of action repeats the foregoing allegations (R. 13-14) and further realleges the renegotiation contract and Government reaudit (R. 14-16). It concludes that the Government's claim was "collected under duress" as a result of the "demands and duress" and that by reason of "said payment under protest required thereby" the Government has been unjustly enriched under these charter parties in the amount of \$34,158.02 (R. 16-17).

Nothing is alleged in either cause of action which will support Richfield's present contention that there was an agreement between the parties to permit Richfield to pay under protest the \$34,158.02 compromise amount on account of the Government's \$75,000 claim and then bring this suit to recover it back. On the contrary, Exhibit K to the libel containing Maritime's letter of July 25, 1955 giving Richfield's counsel the

three alternatives of compromise settlement, set-off or litigation (R. 21-24), and Richfield's letter of August 26, 1955, replying by payment under protest, shows there was no such condition attached by Richfield to the protested payment.

THE EXCEPTIONS AND EXCEPTIVE ALLEGATIONS.

The Government's exceptions and exceptive allegations referred to Maritime's original demand of \$75,000, reduced to a compromise offer of \$34,158.02, based upon the 45-55 percent compromise settlement formula referred to in the July 25, 1955 letter (Exhibit K) as offered to all West Coast oil companies (R. 27-28). Additional background correspondence relating to the compromise negotiations (Exhibits "AA", "BB" and "CC") was presented showing the circumstances in which Richfield paid the compromise offer of \$34,158.02. The exceptions concluded that Richfield's payment constituted a voluntary payment, was not under duress and was not recoverable (R. 28-29).

RICHFIELD'S "ANSWER" TO THE EXCEPTIONS AND EXCEPTIVE ALLEGATIONS.

Instead of filing the usual affidavit in opposition to the exceptive allegations, Richfield filed a document which it entitled "answer to respondent's exceptions and exceptive allegations to the amended libel" which exhibited the remainder of the correspondence (R. 38-39). This "answer" presented new argumentative

allegations which, it asserted, "clearly show that one of the grounds establishing the involuntary nature of the payment is that the payment was made under an express reservation of the right to pay under protest and sue for recovery" (R. 39). It referred again to this Court's previous decision and the settlement negotiations as reflected in the correspondence (R. 39-41) and to Maritime's letter of May 10, 1954 (Exhibit Q to the "answer") which specifically stated that compromise on the 55-45% basis "necessarily would preclude any payment under protest and recourse to the Courts for recovery thereof" (R. 49).

Richfield's "answer," after asserting that the settlement negotiations culminated in the Government's final letter of July 25, 1955 (Exhibit K, R. 21-24), which gave Richfield 30 days to choose between the alternatives of compromise settlement, set-off, or being sued, then asserts that before Richfield's payment by letter of August 26, 1956, there was a prior telephone conversation with Maritime's counsel, Pimper, and continues as follows (R. 42):

"* * * Shortly before expiration of the thirty-day period set forth in said letter from Mr. Pimper, counsel for libelant telephoned Mr. Pimper and advised that if respondent would recede from its position stated by the District Counsel, that payment under protest would not be accepted, libelant would pay the claim under protest to prevent the threatened offset and would institute suit to recover. This Mr. Pimper agreed to do, whereupon, *reserving the right to sue for recovery, libelant made the payment under protest to prevent seizure of its property.*"

This assertion, of course, is directly contrary to the terms of Richfield's letter of August 26, 1955, accompanying the payment under protest, which was written after the foregoing asserted telephone conversation (Exhibit K, R. 18-21). The August 26, 1956, letter merely stated payment of the compromise amount was made under protest.

THE ORDER DISMISSING THE AMENDED LIBEL.

Richfield did not seek leave to further amend its libel to add thereto allegations corresponding to the assertions in its "answer" that there was a prior telephonic agreement contrary to its letter of August 26, 1955 (Exhibit K to the Amended Libel, R. 18-21) under which the Government agreed to accept the payment under protest of the compromise amount for the purpose of letting Richfield sue the United States instead of the United States suing Richfield. Instead, the order of dismissal expressly recites (R. 55-56) that——

* * * the Court determining that the exceptions are well taken and the Court having advised Proctor for Libelant that if desired Libelant might file an amended Libel, and the Proctor for Libelant advising that upon stipulation of the parties the exceptions and exceptive allegations and the answer of Libelant to the exceptions and exceptive allegations would be a part of the record on appeal that Libelant did not desire to file an Amended Libel. * * * the exceptions are sustained and the amended libel dismissed.

It is from that order that this appeal is taken.

SUMMARY OF ARGUMENT.

I. *Richfield's amended libel does not allege any agreement that it could voluntarily pay the amount of the Government's compromise offer under protest and then sue to recover it back.*

Richfield's amended libel is limited to claiming payment under protest. If it was Richfield's intention to claim payment under a prior telephone agreement giving it the right to sue, such claim should have been embodied in its libel and, at the very least, included in its letter transmitting payment of the compromise amount under protest. Richfield's payment of the compromise settlement proposed by the Government was not conditioned upon any reservation of a right to sue for recovery. Consequently, Richfield's authorities are inapplicable because the facts in this case, unlike those relied on by Richfield, show no agreement reserving a right to sue for recovery back.

II. *This Court's previous Richfield decision establishes that payments under threat of withholding and offset by the Government are voluntary and not recoverable.*

Richfield's amended libel fails to allege any facts constituting duress as a matter of law and its conclusionary allegations of duress are contrary to the terms of the exchange of correspondence forming Exhibit K (R. 18-25) and are not admitted but instead are contradicted by the exceptions and exceptive allegations. The facts as they appear show that no seizure of Richfield's property was threatened, but only that the Government might withhold money otherwise owed

to libelant or bring suit against Richfield to enforce its \$75,000 claim.

Richfield's payment of the \$34,158.02 compromise settlement proposed by the Government was thus, as a matter of law, not under duress but voluntary and hence not recoverable. Such voluntary payment was not rendered recoverable merely because it was made under protest, and in consequence of the Government's threat to sue or withhold and because Richfield considered payment the lesser evil. Authorities dealing with actual duress by seizure of goods, which Richfield invokes, are not applicable to threats of withholding payment of moneys due, which is the whole of the facts in the case at bar.

ARGUMENT.

I.

RICHFIELD'S AMENDED LIBEL DOES NOT ALLEGE ANY AGREEMENT THAT IT COULD VOLUNTARILY PAY THE AMOUNT OF THE GOVERNMENT'S COMPROMISE OFFER UNDER PROTEST AND THEN SUE TO RECOVER IT BACK.

If, as is now asserted in Richfield's brief (pp. 6, 8, 18, 21, 23, 24) payment of the Government's compromise offer was made under a prior telephonic agreement expressly reserving the right to sue to recover the payment back, it should have been alleged in the amended libel or a further amendment filed. Moreover, presumably the agreement would be stated in the later letter of August 26, 1955, forwarding the pay-

ment under protest (Exhibit K, R. 18-21). In the present state of the record Richfield refused to amend and now has no right to raise the point at all. Even if it could raise it, still it is contrary to the later written agreement in the record.

The letter of August 26, 1955, merely states that payment is made under protest (R. 18-21). Nothing is said as to any agreement with Government counsel as to reservation of rights to sue. The amended libel itself, as previously indicated, makes repeated allegations (R. 13, 14, 17) of "duress" and payment "under protest", but nothing of an agreement for suit. This payment under protest is expressly related to Exhibit K, the letter which covered it (R. 18-21), yet nothing is said in Exhibit K concerning any agreement with reservation of rights to sue.

As late as June 4, 1956, when the amended libel was filed, libelant consistently adhered to its sole theory of payment under protest. The fatal weakness in libelant's present position is that the record, which shows the steady course of correspondence between the parties (*supra*, pp. 3-6), fully reflects their contemporaneous understanding that there was no agreement that Richfield might pay the compromise and then sue. To attempt at this late stage to graft upon that correspondence an asserted prior contrary *telephonic* understanding, to which Government counsel is supposed to have agreed, whereby Richfield was given the right to sue, is an afterthought of counsel only designed to avoid the normal operation of the voluntary payment rule.

Moreover, Richfield's belated attempt to rely upon the alleged prior telephone conversation is frustrated by the parol evidence rule. Richfield's letter of August 1955 (Exhibit K, R. 18-21) transmitting the \$34,000 compromise payment in accordance with Maritime's 55-45 formula was accepted by the Government in accordance with its written terms, thereby establishing the settlement agreement and merging prior negotiations and conversations. This letter agreement cannot now be varied by parol evidence as to prior telephone negotiations. See *Bernheimer v. First National Bank*, 78 F. 2d 139 (C.A. 9, 1935), certiorari denied, 296 U.S. 639; *Murphy v. Craig*, 28 F. 2d 963 (C.A. 9, 1928); *Kaplan v. American Cotton Oil Co.*, 12 F. 2d 969 (C.A. 5, 1926).

Inasmuch as the parties were dealing at arm's length and were both represented by legal counsel, Richfield's counsel should have followed the example of similar parties in the *Ohio Oil*, *New York R.R.*, *Lobit* and other cases, which he now invokes, and expressly included in the correspondence a written condition of Richfield's right to sue for recovery back. If this right was so vitally needed at the time of the conclusion of the settlement negotiations, it was far more important for Richfield's letter of August 26, 1955, to have stated that payment might only be retained by Maritime if it agreed to the express reservation of rights to sue than that it say, as it actually did, that payment was made under protest. Absent such an agreement, Richfield's present reliance on those cases is footless.

Counsel's attempts to twist its authorities to reach the actual facts of this case, where there was no such agreement, avail it nothing. It may first be noted that the quotation in Richfield's brief (p. 23) from the summary of the law appearing in 70 Corpus Juris Secundum omits statements which defeat recovery in the case at bar. With specific reference to the reservation of rights the full statement in 70 Corpus Juris Secundum, § 144, p. 349, continues as follows:

Reservation of rights. A payment made with the express reservation of the right to recover it by suit has been held to authorize a recovery thereof. *It has also been held, however, that a voluntary payment made without coercion, duress, compulsion, or fraud may not be recovered notwithstanding the payor made such payment on the express condition that he did not waive any rights that he may have had to recover it.* [Emphasis added]

Similarly, the statement, of which Richfield's other quotation is only the last sentence, contains the following in 70 Corpus Juris Secundum, sec. 153, p. 360:

Effect of Protest. Generally, in the absence of a statutory provision otherwise, a payment cannot be recovered back as being compulsory or involuntary by reason of the mere facts that it is paid unwillingly and that the payor at the time of payment makes a protest against the payment. * * * [However,] where there is a controversy between persons, and money is paid in protest of its correctness and with the assurance of a suit for the recovery of all or a part of it *and that situation is assented to*, the amount is thereby

left open to be adjudicated and the payment is not voluntary. Where a receipt taken for the money paid *expressly states that the payment is under protest and does not defeat the right to sue and recover* the money, it may be recovered back regardless of whether or not the facts amount to payment under duress. [Emphasis added]

It likewise appears that in the cases relied on by Richfield significant language relating to the necessity of *agreement* as to right of suit are omitted from the brief.

Thus, in *United States v. Ohio Oil Co.*, 163 F. 2d 633 (C.A. 10, 1947), certiorari denied 333 U.S. 833, the Court stated (pp. 636-637):

When a dispute arose between the Secretary as lessor and the Ohio as lessee concerning the power and authority of the Secretary under the contract to fix and determine the minimum value of the royalty oil, *the disputants entered into a solemn agreement under which the 'Ohio delivered to the Secretary the amount in controversy, on the condition that it would be deposited in the treasury of the United States in a trust-fund receipt account entitled "unearned moneys, lands (Interior Department) available for refund" as authorized by Section 19 of the Permanent Appropriations Repeal Act, 48 Stat. 1232, 31 U.S.C.A. § 725r.* [Emphasis supplied]

In the case of *In Re New York, O. & W. R. Co.*, 178 F. 2d 765 (C.A. 2, 1950), there was also an express agreement under which the right was reserved to

apply to the Court to test the right to the money in question. It stated (p. 766):

“In view of all the circumstances surrounding this situation, we are enclosing herewith check for \$5259.84 representing the balance claimed by the Trustee, as per your letter of May 20, 1946, without prejudice and under protest. In this connection *we reserve the right to apply to the Court for a review of all of these bills and with the understanding that to the extent that such review shall determine there is any moneys due and owing to us by the Trustees, you will comply with such order as the Court may issue in connection with our petition.*” [Emphasis supplied]

Again in *Lobit v. Marcoulides*, 225 S.W. 757 (Tex. 1920), relied upon by Richfield (Br. p. 22), there was an agreement as to the right to sue. This is pointed out by the Court (p. 759):

Appellees then, in order to procure their loan, which they had negotiated at large expense, agreed to pay appellants the amount claimed by them, with the understanding that they paid it under protest, and *such payment should not prejudice their right to sue for its recovery. Appellants received the money under this express agreement, and so stated in the receipt and release executed by them to appellees.* [Emphasis supplied]

It may be noted that in quoting from the Court's opinion (p. 762) Richfield omits the significant language which follows immediately thereafter:

Having obtained the money from appellees under this express agreement, appellants cannot

claim that the payment was a voluntary one, and that appellees cannot recover the money which, under finding of the jury, they did not owe appellants, and it would be manifestly unjust to allow appellants to retain it. 21 Ruling Case Law, p. 143; U.S. v. Edmonston, 181 U.S. 500, 21 Sup. Ct. 718, 45 L. Ed. 978. [Emphasis supplied]

These instances are typical of all Richfield's cases and quotations.

The California decision in *Replogle v. Ray*, 48 Cal. App. 2d 291 (1941), is finally relied upon by Richfield (Br. pp. 22-23), because the agreement reserving the right to sue was not in writing (Br. p. 23). But there again the Court specifically found (p. 307)—

* * * that *it was agreed between the parties at the time of said settlement* that their respective claims, which were made the subject of this litigation, should be reserved for future adjustment and settlement and that said claims should not be prejudiced by the settlement of the Air Way litigation. [Emphasis supplied]

The *Replogle* case, therefore, is clearly distinguishable from the case at bar. There was express agreement for suit.

In the present case, we find that Richfield and the Government, both represented by legal counsel, were not only dealing at arm's length but were preserving their respective positions for the record by means of letters carefully drafted by their lawyers. Obviously, there was no desire on either side to rely upon oral understandings by telephone. We submit, therefore,

that Richfield's cases only serve to prove that it cannot maintain this suit.

II.

THIS COURT'S PREVIOUS RICHFIELD DECISION ESTABLISHES THAT PAYMENTS UNDER THREAT OF WITHHOLDING AND OFFSET BY THE GOVERNMENT ARE VOLUNTARY AND NOT RECOVERABLE.

On Richfield's previous appeal, this Court has already resolved against Richfield the two contentions now repeated, (1 that payment under the Government's threat of withholding, setoff and suit amounted to seizure of its property and constituted duress, making payment involuntary (Br. 10-15), and (2) that it had the right to choose the lesser of the two evils by paying the Government under protest and suing the United States, rather than waiting for the United States to withhold and then sue (Br. 15-18). This Court's opinion on that case (207 F. 2d at 870-871) is completely dispositive of the only issues actually raised by Richfield's amended libel and the Government's exceptions and exceptive allegations. In rejecting Richfield's contention that withholding and setoff was duress, the Court there stated:

Manifestly the appellant has adequate means for challenging the disputed contention as to the \$75,000 and the asserted right of setoff by suing in the Court of Claims for the amounts due for petroleum products sold to the United States, should payments be withheld as threatened. This is the traditional remedy in such cases.

* * * the complaint is wholly wanting in any specification of facts which would disclose any duress under which appellant could have been acting. The assertion of duress is a mere conclusion. And the complaint shows conclusively, we think, that duress in a legal sense was wholly wanting.

The leading Supreme Court case is *Silliman v. United States*, 101 U.S. 465 (1879). There the Government threatened that all compensation would be withheld from a contractor unless he agreed to a new contract at a lower rate. The contractor agreed under protest, accepted payment at the lower rate and sued for the difference. In denying recovery to plaintiffs, Justice Harlan stated (pp. 470-471):

They now seek the aid of the law to enforce their rights under the original charter-parties, upon the ground that those last signed were executed under such circumstances as amounted, in law, to duress. Duress of, or in, what? Not of their persons, for there is no pretence that a refusal, on their part, to accede to the illegal demand of the quartermaster's department would have endangered their liberty or their personal security. There was no threat of injury to their persons or to their property, to avoid which it became necessary to execute new charter-parties. Nor were those charter-parties executed for the purpose, or as a means of obtaining possession of their property. They yielded to the threat or demand of the department solely because they required, or supposed they required, money for the conduct of their business or to meet their pecuniary obligations to others. Their duty, if they expected to

rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiation of a valid contract.

See also *Hartsville Oil Mill v. United States*, 271 U.S. 43 (1946) holding a threat to break a contract is not duress.

Richfield both now and on its previous appeal has asserted, however, that the Government threatened to seize its property when all that occurred was a threat of withholding, setoff and suit. Maritime's July 25, 1955 letter (Exhibit K at R. 24) makes this plain. This threat of setoff or suit is perfectly permissible as indicated in *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947), where the Supreme Court explicitly recognized the Government's right to withhold and setoff against an amount admitted to be due a contractor under another contract. The Court stated (pp. 239-240):

The government has the same right "which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot v. United States*, 15 Pet. 336, 370; *McKnight v. United States*, 98 U.S. 179, 186. More than that, federal statute gives jurisdiction to the Court of Claims to hear and determine "All set-offs, counterclaims, claims for damages, whether liquidated, or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court . . ." Judicial Code

§ 145, 28 U.S.C. § 250 (2). This power given to the Court of Claims to strike a balance between the debts and credits of the government, by logical implication gives power to the Comptroller General to do the same, subject to review by that court.

So here Richfield could have sued if the Government offset or waited for the Government to sue it.

The lower court cases that refusal to pay is not duress are countless. In *Kingsbury v. United States*, 68 Ct. Cl. 680 (1930), a plaintiff who had agreed to a price reduction refused to refund the difference claiming duress, the Government withheld payments due him and he sued claiming an involuntary payment "under protest and duress." Citing *Silliman* and *Hartsville*, the Court rejected his claim, stating (p. 693):

The only grounds which the plaintiff states as compelling him to sign the contract were "delayed payments, unpleasant controversy, and annoying, expensive interference with the normal conduct and development of [his] business." This, under the decisions, is not duress.

Compare *Holt v. Quaker State Oil Refining Co.*, 67 F. 2d 170 (C.A. 4, 1933); *Connolly v. Bouch*, 174 Fed. 313 (C.A. 8, 1909); *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945 (Ct. Cl. 1953).

In *Vines v. General Outdoor Advertising Co.*, 171 F. 2d 487 (C.A. 2, 1948), where plaintiff's employer had threatened to withhold money due him for services already rendered, the Court said (p. 490):

If the defendant threatened to repudiate the debt, the situation falls within the New York decisions which we have cited that such a repudiation "without more" is not duress; * * * on the other hand, if the defendant did not threaten to repudiate the debt, but merely made its cancellation a condition of the plaintiff's continuing in its employ, there was no shadow of duress in that.

So payment because of fear that the payee will discontinue dealing with plaintiff is not involuntary. *Detroit Edison Co. v. Wyatt Coal Co.*, 293 Fed. 489, 494 (C.A. 4, 1923); *Pure Oil Co. v. Tucker*, 164 F. 2d 945, 948 (C.A. 8, 1947); *Dennehy v. McNulta*, 86 F. 2d 825, 829 (C.A. 7, 1898), certiorari denied, 176 U.S. 683; *Brock v. Anderson-Prichard Oil Corp.*, 135 F. Supp. 579, 582 (W.D. Okla., 1955).

Because the Government's threat of withholding, setoff and suit did not constitute duress as a matter of law, Richfield's payment was voluntary and not recoverable. As the Court said in *Manhattan Milling Co. v. Manhattan G. & E. Co.*, 115 Kans. 712, 225 Pac. 86-91 (1924):

It is elementary that the law does not recognize a privilege to pay an illegal demand and then to sue for the money. It is only when, in an emergency for which he is not responsible, a person finds he has no choice except to pay in order to protect his business interests that he may recover.

So in *United States v. Edmondston*, 181 U.S. 500 (1901), it appeared that plaintiff paid \$200 more than the law required him to pay for the purchase of land

from the Government. In reversing judgment for plaintiff and remanding with instructions to enter judgment for the Government, the Court said (pp. 502-503):

If the parties to the transaction were both private individuals, it would clearly be a case of voluntary payment, and the amount overpaid would not be recoverable. * * * But it is insisted that the relations between the government and its purchaser are not like those between two individuals—that there is a constraining power in the government, a species of force or compulsion in its action, which makes the payment of money by one purchasing land from it through its officers a payment not voluntary but an exaction, and therefore enables the purchaser to recover any excess in the price.

We may not enter into any discussion of the mere equities of this transaction or the extent of the moral obligation resting on the government to repay a purchaser an excess in the price charged to and received from him. Our inquiry is limited to the question whether, in the statutes conferring jurisdiction on the Court of Claims, Congress has intended to acknowledge the liability of the government to every individual who has paid to any one of its officers a sum in excess of the legal charge for property or services and given to that court the power to render judgment against it for such excess.

The Court reviewed the authorities and concluded (pp. 510-511):

It is clear from these references that this court has distinctly and constantly recognized the doc-

trine that where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered, and also that that doctrine applies to cases in which one of the parties is the government and that money thus voluntarily paid to the government cannot be recovered.

To the same effect see *Pure Oil Co. v. Tucker*, 164 F. 2d 945, 947-948 (C.A. 8, 1947); *Detroit Edison v. Wyatt Coal Co.*, 293 Fed. 489, 493-494 (C.A. 4, 1923).

That payment was under protest makes no difference. In *Union Pacific Railroad Company v. Dodge County Commissioners*, 98 U.S. 541, 543 (1879), the Supreme Court adopted as a correct statement of the rule a quotation from *Wabaunsee County v. Walker*, 8 Kan. 431 (1871), as follows:

“Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, *such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary.*”
[Emphasis supplied.]

Similarly in *Chesebrough v. United States*, 192 U.S. 253 (1904), suit was brought to recover \$600 paid for Internal Revenue stamps which plaintiff purchased from the Government and attached to a deed. The claim made was that the stamps were purchased and

affixed under duress and the law requiring their use was unconstitutional. The Supreme Court held the payment voluntary and not recoverable, saying at pages 259-260:

* * * generally speaking, even *a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power* possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment. *Little v. Bowers*, 134 U.S. 547, 554; *Railroad Company v. Commissioners*, 98 U.S. 541, 544; *Radich v. Hutchins*, 95 U.S. 210.
* * * [Emphasis supplied]

Thus, it is submitted, Richfield has no right to recover back its compromise payment. Neither the threat of withholding, set off and suit nor the making of protest at the time of payment will serve to render the payment involuntary and recoverable.

CONCLUSION.

For the foregoing reasons, we believe it is clear (1) that the pertinent written correspondence, all of which is in the record, shows libelant Richfield made a voluntary payment under protest of the compromise amount, (2) that no prior telephonic agreement for payment with right of suit for recovery back may be proven under the amended libel, and (3) that payment under

the alleged threat of withholding, offset and suit did not constitute duress so as to permit suit for recovery back. The dismissal of the amended libel by the Court below should accordingly be affirmed.

Dated, December 28, 1956.

Respectfully submitted,

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No. 15296

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHFIELD OIL CORPORATION,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Introductory Statement.

The most that can be said for appellee's brief is that it raises issues of fact necessitating a trial on the merits.

In the following pages we will show how appellee has run out on its stipulation and has presented questions and raised issues of fact which cannot be considered by this Court.

In the interest of orderly presentation, our discussion will follow the headings in appellee's brief.

The Section of Appellee's Brief Entitled "Questions Presented."

Here appellee takes the first step in repudiating its stipulation, entered into with the consent of the trial court, that the exceptive allegations and the verified answer thereto would be a part of the record on appeal before this Court. The questions to be considered here, therefore, cannot be as stated by appellee.

Since "voluntary payment" is an affirmative defense, like raising the statute of limitations, it is not necessary for the appellant to anticipate or negative it in the libel. When the defense of voluntary payment was raised by exceptions and exceptive allegations, it was proper for the appellant to answer the exceptive allegations under oath. Appellant's verified answer to the exceptive allegations included an allegation that there had been a telephonic agreement by appellee's counsel to accept payment under protest with appellant reserving the right to sue for recovery. This was a complete answer to the exceptive allegations and must be accepted as true in this summary proceeding, and the trial court erred in not so holding.

If those allegations are not accepted as true, then there are presented issues of fact, necessitating a trial on the merits. "Controverted issues may not suitably be tried upon exceptions."

Benedict on Admiralty (6th Ed.), Sec. 333;
Frederick Hart & Co. v. Recordograph Corp., 169
F. 2d 580 (C. A. 3, 1948);
Klein v. Lionel Corp., 18 F. R. D. 184 (1955);
G. Ricordi & Co. v. Slomanson, 19 F. R. D. 196
(1956).

The Section of Appellee's Brief Entitled "Counter-statement of the Case."

Here appellee takes the second step in its repudiation by asserting that the matter of the reservation of rights is unsupported in the record. By stipulation of the parties, the verified answer to the exceptive allegations, which expressly alleges the reservation of the right to sue for recovery, was made a part of the record on appeal. It was before the trial court, it is in the record by stipulation, and this is a trial *de novo* on the record.

Appellee then refers to a prior case which involved some *but not all* of the facts alleged herein. The payment sought to be recovered in the case at bar was made long after the decision of this Court at 207 F. 2d 864 and involves additional facts including specifically an allegation of payment under protest with a reservation of the right to sue for recovery. The discussion by this Court in the cited case, relied upon in appellee's brief, had nothing to do with the issues here presented. If it did, it is not controlling because that discussion was not necessary to the disposition of that case and is, therefore, dictum.

Under the authorities which have been cited in appellant's brief, the payment to prevent the seizure of its property is clearly involuntary. Additionally, the law is clear that a payment under protest with the express reservation of the right to sue for recovery is not a voluntary payment and can be recovered.

The Section of Appellee's Brief Entitled "The Correspondence Exhibited With the Pleadings."

Under this heading appellee reviews certain correspondence, of which part was attached as exhibits to the amended libel, part was attached to appellee's exceptive allegations, and part was attached to appellant's answer to the exceptive allegations. That the correspondence took place is not questioned, but appellee attempts to decide the meaning of that correspondence and then concludes that such meaning is contrary to certain allegations of appellant. This, we submit, is raising issues of fact which cannot be done in a summary procedure such as this.

Frederick Hart & Co. v. Recordograph Corp., supra;

United States v. Krasnov, 143 Fed. Supp. 184 (1956);

Klein v. Lionel Corp., supra;

G. Ricordi & Co. v. Slomanson, supra.

Appellee attempts to show inconsistencies. Those are issues of fact for the court below to decide in a trial on the merits.

The Section of Appellee's Brief Entitled "Richfield's Amended Libel."

Under this section appellee completely abandons its stipulation and challenges the truth of appellant's answer to the exceptive allegations, which must be accepted as true for the purpose of considering appellee's exceptions.

In the last paragraph of this section, appellee makes the point that the amended libel does not show the oral agreement and states categorically that Richfield's letter

of August 26, 1955, "shows there was no such condition attached by Richfield to the protested payment." It is clear from a reading of the answer to the exceptive allegations that the agreement was an oral agreement and the letter of August 26, 1955, speaks for itself; it was simply a protest letter made for the purpose of stating the grounds upon which the validity of the payment ultimately would be challenged.

It is not necessary to allege in a libel facts which will negative an affirmative defense, and the affirmative defense of voluntary payment was raised by exceptions and exceptive allegations to the libel. The answer thereto was a complete negation, and appellee has stipulated that such answer shall be a part of the record on appeal. Appellee's repudiation of its stipulation is surprising to say the least.

The Section of Appellee's Brief Entitled "The Exceptions and Exceptive Allegations."

Here again appellee is attempting to resolve an issue of fact. Appellee has asserted several times that the \$75,000.00 demand was reduced by a compromise offer to \$34,158.02. The allegations in the amended libel show clearly that appellee's interpretation just is not correct [R. 10, 11, 12, 14, 16, 27 and 39]. This is further demonstrated by libellant's answer to respondent's exceptions and exceptive allegations [R. 38-43]. The pleadings do not show a compromise settlement but rather show an arbitrary plan adopted by the Government. Appellee is questioning the facts alleged. That it cannot do.

*Frederick Hart & Co. v. Recordograph Corp.,
supra.*

The Section of Appellee's Brief Entitled "Richfield's 'Answer' to the Exceptions and Exceptive Allegations."

It is true that libellant filed a document entitled "Answer to Respondent's Exceptions and Exceptive Allegations to the Amended Libel" instead of the "usual affidavit in opposition to the exceptive allegations." This would appear to be an immaterial variation from the usual practice, for the so-called answer was verified and has the same dignity and effect that an affidavit in opposition would have.

Under this section appellee quotes from that answer and asserts that such statement, which Richfield's counsel made under oath, is directly contrary to his letter of August 26, 1955, accompanying the payment under protest. Then, on page 14 of the brief in the argument section, appellee says that "Richfield's belated attempt to rely upon the alleged prior telephone conversation is frustrated by the parol evidence rule," and, referring to the letter of protest dated August 26, 1955, that "this letter agreement cannot now be varied by parol evidence as to prior telephone negotiations."

The parol evidence rule is in no way involved for two reasons. First, the letter of August 26, 1955, was not an agreement but a pure and simple protest reciting the grounds upon which it was contended that the claim of the Government was illegal and improper. Secondly, the telephonic agreement in no way varied the letter of August 26, 1955. The letter and the oral agreement are perfectly consistent. Actually, in view of the fact that the Government had steadfastly refused to accept payment under protest [R. 49] until the oral agreement, it follows that some agreement must have been reached for

the Government to accept payment under protest because it did accept the payment with the protest letter of August 26, 1955.

Moreover, it is significant that appellee did not get and present to the court below an affidavit from Mr. Pimper to controvert the allegations contained in the answer to the exceptive allegations. Not only does that verified answer stand uncontroverted in the record, but, as a matter of law, it must be accepted as true.

The Section of Appellee's Brief Entitled "The Order Dismissing the Amended Libel."

Under this section appellee makes the point that Richfield did not seek to further amend its libel to include its assertions contained in the answer to the exceptive allegations. Counsel for appellee knows full well that such an amendment would have been an idle act, for at the time the stipulation was entered into with the approval of the Court, the Court had indicated clearly that if the libel were so further amended, he would still dismiss it. Under that state of facts and with the stipulation of the parties that the "answer" would be considered part of the record on appeal (which is a trial *de novo* on the record), libelant declined to further amend.

If appellee can now run out on that stipulation, or if the Court does not want to consider the allegations contained in the "answer," then this Court should remand the cause to the District Court with instructions to permit libelant to further amend the amended libel.

The Section of Appellee's Brief Entitled "Summary of Argument."

Under this summary of argument appellee makes two points; first, that Richfield's *amended libel* does not allege any agreement that it would pay under protest and sue to recover; and second, that this Court's previous Richfield decision establishes that payments under threat of withholding and offset by the Government are voluntary and not recoverable. These points are discussed below.

Appellee's Argument on Its Two Points.

POINT I.

As to the first point, it is evident that appellee has turned its back completely upon its stipulation, for it says in effect that because appellant did not allege in its amended libel the facts which are stated in its answer to the exceptive allegations and refused to further amend the amended libel to incorporate such allegations, it "now has no right to raise the point at all." (Appellee's Br. p. 13, line 3.)

In other words, appellee takes the position that the answer to the exceptions and the exceptive allegations does not exist for the purpose of this appeal even though appellee stipulated that it would become a part of the record on appeal and this is a trial *de novo* on the record.

This Court should not tolerate such conduct.

Under this heading there will be found many places where the appellee asserts that no agreement to accept payment under protest took place between Richfield's counsel and Mr. Pimper, as is alleged in the answer to the exceptive allegations. Here again, appellee is attempting to put itself in the position of a trial court trying issues

of fact during a trial on the merits. It is simply challenging the truth of the allegations which it must accept as true for the purpose of its exceptions. This we have shown it cannot do, and the trial court erred when it decided that no agreement existed and sustained the exceptions.

Frederick Hart & Co. v. Recordograph Corp., supra.

In the *Frederick Hart* case there had been an allegation in the complaint that the defendant charged the plaintiff with infringement, claimed royalties, and asserted rights under 15 patents. Hart denied infringement, alleged invalidity of the 15 patents, and asked for declaratory judgment. The defendant filed interrogatories and moved to dismiss, filing supporting affidavits. Hart then filed counteraffidavits challenging the former's correctness.

That factual situation is quite similar to the situation presented here. In both cases the court had before it allegations in the complaint supplemented by sworn statements. There the Court said at page 583:

"The foregoing clearly establishes the *existence of a fact issue* with respect to what was actually said by Murray to Weber. It was at that point that the District Court's consideration should have terminated and Recordograph's motion denied. Instead, the District Court proceeded to *decide* the fact issue and thereby committed error under the applicable principles of law stated earlier in this opinion. It is immaterial that it *decided* the fact issue in Recordograph's favor—the point is that it went beyond its province to resolve any fact issue on a motion to dismiss or for summary judgment." (Emphasis supplied by the court.)

POINT II.

As to the second point of appellee's argument, it is asserted that because the Government has the right to offset claims against moneys due a contractor, the threatened act of offsetting does not constitute duress because, under the older cases cited and relied upon by appellee, the payment of the Government's claim to prevent offset is not duress in the legal sense.

We have shown in our opening brief that appellee's harsh rule has been greatly modified and that under the later cases, notably *Southern Pacific Co. v. United States*, 268 U. S. 263, 69 L. Ed. 947 (1925), payments under protest are recoverable.

Moreover, offset is a summary remedy just like distress which is the seizure or withholding of the property of another. The yielding to an illegal demand to pay in order to prevent seizure of one's property is not a voluntary payment,

Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor,
223 U. S. 280, 56 L. Ed. 436 (1912)

and it has been expressly held that where the payment was made to avoid "possible deduction from moneys thereafter to become due to plaintiff from the United States," and without waiver of right to sue for recovery the payment may be recovered.

Empire Engineering Co. v. United States, 59 Ct.
Cls. 904 (1924).

It follows that the summary seizure of property by offset is recognized as a threatened action sufficient to make involuntary a payment made to prevent this occurrence, just as a payment is involuntary when it is made to prevent distress of property. That is precisely what happened here.

It should be pointed out at this time that even if libelant did not show duress and did not agree to pay under protest with a reservation of the right to sue for recovery, libelant still has stated a cause of action in this case under the authorities.

Swift and Courtney and Beecher Co. v. United States, 111 U. S. 22, 28 L. Ed. 341 (1884).

Under the rule of the *Swift* case, where the officers of the Government had established a course of conduct contrary to law, refused to deviate from that course, and made their decision known, it is unnecessary to follow any other course of action.

Here, the appellee established a course of conduct contrary to law (as alleged in the libel) whereby it demanded sums of money from libelant which were not due from libelant and refused to accept payment thereof under protest with a reservation of the right to sue for recovery. Under the circumstances, it was not necessary to show duress and libelant would not have had to pay under protest reserving the right to sue for recovery, in order for its libel to state a cause of action.

In the *Swift* case, as here, the Government asserted that the payment was voluntary and could not be recovered. The question presented on appeal was whether such payments were made voluntarily in such a sense as to preclude recovery. The Court answered the question in the negative, and on the question of whether or not a formal protest was necessary said at page 344:

“No formal protest, made at the time, is, by statute, a condition to the present right of action, as in cases of action against the collector to recover back taxes

illegally exacted; and the protests spoken of in the findings of the Court of Claims as having been made prior to 1866 by manufacturers of matches and others requiring such stamps, are of no significance, except as a circumstance to show that the course of dealing prescribed by the Commissioner had been deliberately adopted, had been made known to those interested and would not be changed on further application and that, consequently, the business was transacted upon that footing, because it was well known and perfectly understood that it could not be transacted upon any other. *A rule of that character, deliberately adopted and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced.* This principle was recognized and acted upon in *U. S. v. Lee*, 106 U. S., 196-200 (XXVII., 171-174), where it was held that the officers of the law, having established and acted upon a rule that payment would be received only in a particular mode, contrary to law, dispensed with the necessity of an offer to pay in any other mode, and the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary by law to secure his right.” (Emphasis added.)

Here we have gone beyond what is required. We have alleged duress and coercion, and we have alleged an agreement on the part of the Government to accept the payment under protest with a reservation of the right to sue for recovery.

Conclusion.

The matter of voluntary payment is a matter of defense, like raising the statute of limitations, which could have been waived. Libelant does not have to anticipate such a defense in the libel. Having been raised by exceptive allegations, however, it is proper to answer those exceptive allegations. That has been done in this case, and by stipulation of the parties, with the approval of the Court, the exceptive allegations as well as the answer thereto have been made a part of the record on appeal.

Like any other facts presented to the Court in a summary proceeding such as this, the facts must be accepted as true. Appellee's brief is alleging the existence of issues of fact, for the Government is controverting certain facts alleged and taking others and telling the Court they must be interpreted in a certain way. Thus issues of fact are presented and the only course open to this Court is to remand the case for trial.

Respectfully submitted,

DAVID GUNTERT,

Attorney for Appellant.



No. 15299

United States
Court of Appeals
for the Ninth Circuit

WALTER J. HEMPY, as Trustee of the Estate
of Mechanix, Inc., a corporation, bankrupt,
Appellant,

vs.

JOHN HOWARD SIMS and MARVIN D.
MORROW, Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

DEC - 3 1956

PAUL P. O'BRIEN, CLERK



No. 15299

United States
Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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Counsel for Appellant.

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986 Mills Building,
San Francisco 4, California,

Counsel for Appellees.



In The United States District Court, Northern
District of California, Southern Division

No. 34133—Civil

WALTER J. HEMPY, as Trustee of the Estate of
MECHANIX, INC., a corporation, Bankrupt,
Plaintiff,

vs.

JOHN HOWARD SIMS and MARVIN D. MOR-
ROW, Defendants.

EXCERPT FROM DOCKET ENTRIES

1954

Oct. 18 Filed complaint—issued summons.

* * * * *

1955

Mar. 5 Filed answer of defendant. * * * * *

1956 * * * * *

Apr. 26 Court trial. Evidence and exhibits intro-
duced, ruling on motion of Alfred Miller
to dismiss reserved and case submitted.
(Judge Goodman.) * * * * *

Apr. 27 Filed order for entry of judgment for de-
fendant. Findings and Conclusions to be
presented to court. (Judge Goodman.)

* * * * *

June 7 Filed findings and conclusions. (Judge
Goodman.)

7 Entered judgment—filed June 7, 1956—
that plaintiff take nothing and defendants
to recover costs. (Judge Goodman.)

* * * * *

- July 5 Filed notice of appeal by plaintiff.
5 Filed appellants' designation of record on appeal. * * * * *
Aug. 14 Filed order extending time to docket appeal to September 11, 1955. (Judge Goodman.)
Sept. 7 Filed reporter's transcript of proceedings.
-

[Title of District Court and Cause.]

COMPLAINT TO RECOVER PREFERENCE

Complaining of the Defendants above named and for cause of action, Plaintiff alleges:

I.

That on or about the 13th day of March, 1953, an involuntary petition in bankruptcy was filed against Mechanix, Inc., a corporation, in the above entitled court, in proceeding numbered therein 41488; that thereafter said Mechanix, Inc. was duly adjudged bankrupt; and that thereafter in proceedings duly had Plaintiff was nominated, elected and thereafter appointed as Trustee of the estate of said Mechanix, Inc., a corporation, Bankrupt; that thereafter Plaintiff qualified and ever since has been and now is the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

II.

That the Defendant Marvin D. Morrow, was, at all times herein mentioned, an officer, to-wit: President, and a Director of said Bankrupt; and that

John Howard Sims was an officer, to-wit: Secretary-Treasurer, and a Director of said corporation at all times herein mentioned.

III.

That within four months prior to the filing of the petition in bankruptcy as aforesaid against said *Mechanix, Inc.*, a corporation, said Defendant caused said Bankrupt to pay to each of them the sum of \$1,500.00; that said payments represented compensation by said Defendants for past services rendered and that at the time of receiving said payments said Defendants gave no present consideration therefor, nor did said Bankrupt receive any present consideration therefor.

IV.

That at the time of said payments by said Bankrupt to Defendants as aforesaid, said Bankrupt was insolvent and said Defendants knew or had reasonable cause to believe that said Bankrupt was insolvent at said time; that the effect of said payments to said Defendants was to prefer said Defendants over the then existing general and wholly unsecured creditors of said Bankrupt.

V.

That at the time of said payments to Defendants there were other general unsecured creditors, and that the assets in the estate of said Bankrupt are not sufficient to pay the claims of said creditors in full.

VI.

That this court has jurisdiction over the subject matter pursuant to the provisions of Section 60(b) of the Bankruptcy Act.

Wherefore, Plaintiff prays for judgment against said Defendants for the sum of \$1,500.00 from each of said Defendants; for his costs herein incurred and for all proper relief.

SHAPRO & ROTHSCCHILD,
/s/ By AUGUST B. ROTHSCCHILD,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS

Come now the defendants above named and answering the complaint of plaintiff on file herein, admit, deny and allege as follows:

I.

Answering Paragraph III, these defendants admit receiving sums from Mechanix, Inc., but otherwise deny each and every, all and singular, generally and specifically the allegations therein contained.

II.

Answering Paragraphs IV and V, these defendants deny each and every, all and singular, generally and specifically the allegations contained therein.

III.

Each defendant denies that he is indebted to plaintiff in the sum of \$1,500.00 or any sum or sums whatsoever.

Wherefore, these defendants pray that plaintiff take nothing against them and that the complaint be dismissed and that defendants have judgment accordingly.

/s/ ALFRED M. MILLER,
Attorney for Defendants.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 5, 1955.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Ordered: Judgment for defendants upon findings to be presented pursuant to the rules.

Dated: April 27, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 27, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action came on regularly for trial on the 26th day of April, 1956, the Honorable

Louis E. Goodman, Judge, presiding, plaintiff appearing in person and by Shapro & Rothschild and James M. Conners, his attorneys, by Raymond T. Anixter, and the defendants appearing in person and by Alfred M. Miller, their attorney, and evidence both oral and documentary having been introduced, and the Court having been fully advised in the premises, and the matter having been submitted the Court now makes the following Findings of Fact and draws the following Conclusions of Law;

Findings of Fact

1) That the allegations of paragraphs I and II of the complaint are true as set forth therein;

2) That within four months prior to the filing of the petition in bankruptcy against Mechanix, Inc., a corporation, paid to each defendant herein the sum of \$1,500.00 which said payment was compensation to each of the said defendants for labor and services rendered to the said Mechanix, Inc., and that at the said time the said defendants each promised to continue in the employment of Mechanix, Inc.;

3) That at the time of the said payments by the said Mechanix, Inc. to the said defendants, said Mechanix, Inc. did not have sufficient cash on hand to pay all of its creditors;

4) That at the time the said defendants received the said payments the defendants did not know, nor did the said defendants have reasonable cause

to believe that the said Mechanix, Inc., was insolvent;

5) That at the time of the said payment to the defendants there were other general unsecured creditors of the said Mechanix, Inc.;

6) That this Court has jurisdiction over the subject matter pursuant to the provisions of Section 60 (b) of the Bankruptcy Act.

Conclusions of Law

From the foregoing Findings of Fact the Court draws the following Conclusions of Law:

1) That the payment by Mechanix, Inc., the bankrupt herein, of the sum of \$1,500.00 to each of the said defendants, which said payment was made prior to the filing of the petition of bankruptcy against the said Mechanix, Inc., was not a preferential payment by the said Mechanix, Inc., to the said defendants made within four months prior to the filing of bankruptcy and that the said trustee in bankruptcy is not entitled to recover from the defendants the sum of \$1,500.00 from each of the said defendants.

Let Judgment be entered for defendants accordingly.

Done in Open Court this 7th day of June, 1956.

/s/ LOUIS E. GOODMAN,

Judge of the District Court.

[Endorsed]: Filed June 7, 1956.

In the United States District Court, Northern
District of California, Southern Division

No. 34,133

WALTER J. HEMPY, as Trustee of the Estate
of MECHANIX, INC., a Corporation,
Bankrupt, Plaintiff,

vs.

JOHN HOWARD SIMS and MARVIN D.
MORROW, Defendants.

JUDGMENT

The issues in the above entitled cause having been regularly brought on for trial before the Honorable Louis E. Goodman, without a jury, the parties appearing in person and by their respective counsel, and the issues having been duly tried, and the Court on the 26th day of April, 1956, having filed its Findings of Fact and Conclusions of Law directing judgment as herein provided,

Now, therefore, it is hereby ordered that the plaintiff take nothing and that the action be and it is hereby dismissed on its merits and that the defendants have and recover from plaintiff their costs in the action.

Done in Open Court this 7th day of June, 1956.

/s/ LOUIS E. GOODMAN,
Judge of the District Court.

Entered in Civil Docket June 7, 1956.

[Endorsed]: Filed June 7, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on the 26th day of April, 1956, the Honorable Louis E. Goodman, Judge, presiding, plaintiff appearing by Messrs. Shapro & Rothschild and James M. Conners, his attorneys, by Raymond T. Anixter, Esq., and the defendants appearing in person and by Alfred M. Miller, their attorney, and evidence, both oral and documentary, having been introduced, the court having been fully advised in the premises, and the matter having been submitted, the court now makes the following findings of fact and draws the following conclusions of law:

Findings of Fact

1. That the allegations of paragraph I of the complaint are true as set forth therein.
2. That the defendant Marvin D. Morrow, was an officer, to wit, President, and a director of Mechanix, Inc., a corporation, bankrupt, referred to in said complaint at the time of the receipt of said sum of \$1500.00, and that at the time that the defendant John Howard Sims received the payment of \$1500.00 set forth in said complaint he was an officer, to wit, Secretary-Treasurer, and a director of said Mechanix, Inc.; and that said defendants were the managing officers of said Mechanix, Inc., a corporation.
3. That within four months prior to the filing of the petition in bankruptcy against Mechanix, Inc.,

a corporation, said Mechanix, Inc. paid to each defendant herein the sum of \$1500.00 in payment for past services rendered to said Mechanix, Inc.

4. That at the time of said payments by said Mechanix, Inc. to said defendants said Mechanix, Inc. had assets reasonably valued at \$234,001.88 and total liabilities of \$288,058.57.

5. That at the time said defendants received said payments said defendants did not know, nor did said defendants have reasonable cause to believe that said Mechanix, Inc. was insolvent.

6. That at the time of said payment to said defendants there were other general unsecured creditors of said Mechanix, Inc.

7. That there are not sufficient assets in the estate of said Mechanix, Inc., a corporation, bankrupt, to pay the claims of its general unsecured creditors in full.

8. That this court has jurisdiction over the subject matter pursuant to the provisions of Section 60b of the Bankruptcy Act.

Conclusions of Law

From the foregoing facts the court draws the following conclusions of law:

1. That at the time of the payment by Mechanix, Inc., a corporation, to the defendants of the sum of \$1500.00 each, said Mechanix, Inc. was insolvent.

2. That the payment by Mechanix, Inc. within four months prior to the filing of the petition in bankruptcy against it, of the sum of \$1500.00 to each of said defendants was not a preferential pay-

ment, and that said trustee in bankruptcy for Mechanix, Inc. is not entitled to recover from the defendants the sum of \$1500.00, nor any sum.

Let judgment be entered for defendants accordingly.

Dated this — day of May, 1956.

.....

Judge of the District Court.

Affidavit of Service by Mail Attached.
(Rejected.)

[Endorsed]: Filed June 7, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Walter J. Hempy, as Trustee of the Estate of Mechanix, Inc., a corporation, bankrupt, plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 7, 1956.

Dated: This 3rd day of July, 1956.

SHAPRO & ROTHSCHILD and
JAMES M. CONNERS,
/s/ By RAYMOND T. ANIXTER,
Attorneys for Plaintiff.

[Endorsed]: Filed July 5, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

Good cause appearing therefor,

It is hereby ordered that Walter J. Hempy, as Trustee of the Estate of Mechanix, Inc., a corporation, Bankrupt, appellant, may have to and including the 11th day of September, 1956, within which to docket the record on appeal herein.

Dated: This 14th day of August, 1956.

/s/ LOUIS E. GOODMAN,
District Judge.

[Endorsed]: Filed August 14, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Answer.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Findings of Fact and Conclusions of Law Proposed by Plaintiff.

Notice of Appeal.

Designation of Record on Appeal.

Order Extending Time to Docket Appeal.

Reporter's Transcript of Trial Proceedings, April 26, 1956.

Plaintiff's Exhibits 1, 2 and 3.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of September, 1956.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

In the United States District Court, Northern
District of California, Southern Division

No. 34133

WALTER J. HEMPY, as Trustee of the Estate
of MECHANIX, INC., a Corporation,
Bankrupt, Plaintiff,

vs.

JOHN HOWARD SIMS and MARVIN D.
MORROW, Defendants.

REPORTER'S TRANSCRIPT

April 26th, 1956

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiff: Messrs. Shapro

& Rothschild, by Raymond T. Anixter, Esq., 155 Montgomery Street, San Francisco, California; for the Defendants: Alfred M. Miller, Esq. Reported by: Kenneth J. Peck. [*]

Thursday, April 26, 1956, 10:00 O'Clock A.M.

The Clerk: Walter J. Hempy, Trustee of the Estate of Mechanix, Incorporated, Bankrupt, versus John Howard Sims and Marvin D. Morrow.

Will respective counsel please state their appearances for the record?

Mr. Anixter: Raymond T. Anixter, appearing for Shapro & Rothschild, appearing for the plaintiff.

Mr. Miller: Alfred M. Miller appearing for the defendants Morrow and Sims.

Mr. Anixter: May it please the Court, this is an action by Walter J. Hempy as Trustee in Bankruptcy of the Estate of Mechanix, Incorporated. It is an action to recover a preference against two officers and directors of a corporation for payments received by them within a few days prior to the filing of a petition in bankruptcy for past services rendered.

Within a week or so prior to the filing of the petition in bankruptcy each of these officers paid to themselves the sum of \$1500.00 each, and it is the claim of the trustee that this constituted a preference.

Now, certain things I believe can be stipulated to.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

I believe it can be stipulated that a petition in bankruptcy was filed in this matter on the 13th day of March, 1953, is that right? [3]

Mr. Miller: So stipulated.

Mr. Anixter: And that pursuant to proceedings thereafter had, Walter J. Hempy was elected a trustee of the estate in bankruptcy of this bankrupt, and ever since has been and now is the duly qualified and acting trustee of this estate.

Mr. Miller: So stipulated.

Mr. Anixter: I believe it could be stipulated that within the four month period the defendants were each paid the sum of \$1500.00 and that was for past due services?

Mr. Miller: That is correct, your Honor, except that we won't limit that to that consideration; that it was basically for past due services, but there were other factors that entered into it, and we reserve the right to offer evidence on that.

Mr. Anixter: All right. As the trustee sees it then, the issue before the Court in this matter would be the question of solvency at the time these payments were made, and whether or not the defendants had reasonable cause to believe that the corporation was insolvent, if it were insolvent; and that the other creditors, the other general unsecured creditors, did not receive the same proportion of their claims that these creditors received.

Do you have anything at this time?

Mr. Miller: No, I haven't. Mr. Anixter has made a fair statement of the issues. We are prepared to proceed. [4]

I do want to state to the Court at this time, neither Mr. Anixter nor I think it of any great moment, but the Court should know that I was one of the attorneys of the bankrupt corporation and I now appear for defendants Sims and Morrow in their individual capacities. They were officers and shareholders in the corporation.

The Court: Very well.

Mr. Anixter: Mr. Miller, may it be stipulated that at the time these payments were made Mr. Morrow was the president, shareholder and director in the corporation?

Mr. Miller: That is so stipulated.

Mr. Anixter: And that Mr. Sims was the secretary and a director and a shareholder in the corporation?

Mr. Miller: Yes. May it be stipulated further that Mr. Morrow was the sales manager and Mr. Sims the plant superintendent?

Mr. Anixter: And between the two of them they operated this business.

Mr. Miller: Yes, with the help of other key personnel.

Mr. Anixter: Now at this time, Mr. Miller, if you have no objection I would like to call Mr. Hammer, possibly out of the natural order of procedure as he has to get back to his employment.

Mr. Miller: Perfectly all right. [4]

LOUIS HAMMER

called as a witness on behalf of the plaintiff, sworn.

(Testimony of Louis Hammer.)

The Clerk: Please state your name to the Court.

A. Louis Hammer.

Direct Examination

Mr. Anixter: Q. Mr. Hammer, you work with Mr. Walter J. Hempy, the trustee in this case, do you not? A. I do.

Q. And you assisted him in the handling of this matter of Mechanix, Inc., the bankrupt?

A. That is correct.

Q. And as a matter of fact you were in charge of noting the receipts and disbursements?

A. Yes.

Q. And you are familiar with that of your own knowledge? A. Yes, sir.

Q. Now, can you tell us how much the trustee has on hand at the present time?

A. \$27,044.41.

Q. \$27,044.41? And those are the entire assets collected by the trustee?

A. That is the net amount available at the present time. There were additional amounts collected, but there have been [5] disbursements for expenses and so forth.

Q. And out of this nothing has yet been paid to any creditors?

A. That is correct, with the exception of priority wage claims.

Q. Have the priority wage claims been paid?

A. Certain ones have.

Q. How much has been paid to the priority wage claims? A. Approximately \$250.00.

(Testimony of Louis Hammer.)

Q. Other than this no payments have been made to creditors? A. That is correct.

Mr. Anixter: That is all.

Mr. Miller: Just one or two questions.

Cross Examination

Mr. Miller: Q. How much are the claims?

Mr. Anixter: Well, I was going to prove that with someone else. About \$150,000.00 worth of claims are on file.

Mr. Miller: Q. Mr. Hammer, do you have a list of the assets of the corporation?

A. No, I only have the list of the receipts taken in from the sale of the assets.

Q. Do you know whether or not all of the assets have been liquidated and reduced to cash?

A. To the best of my knowledge, they have. [6]

Q. Do you know that some of the assets of the corporation consisted of claims against the United States Government and its various agencies deriving out of ship repair contracts performed by the corporation for the Government?

A. I was aware of that, but I believe the collection of those accounts were in the hands of the trustee's attorney and I am not familiar as to the listing of them.

Q. You don't know what the result of the negotiations have been.

A. The only results that I can put forth here is that there has been \$14,890.06 collected on accounts receivable.

Q. Does it designate the job or jobs?

(Testimony of Louis Hammer.)

A. No, it doesn't.

Q. Again it may well be that certain negotiations are still open, is that correct?

A. It could be.

Q. Then your testimony that all assets have been liquidated would simply be your opinion not based on fact.

A. That is correct.

Mr. Miller: We ask that that answer be stricken by your Honor, that all assets have been liquidated. I thought the gentleman had the records available when I asked the question.

Mr. Anixter: I have no objection.

The Court: All right.

Mr. Miller: Q. If I understand your answer correctly, Mr. Hammer, you simply have a record of receipts? [7]

A. Yes, sir.

Q. Without reference to the particular asset?

A. That's right. For example, I have here—well, the only one particular case that I note here on the record is that of the Treasurer of the United States, repair of a certain General Black.

The other large amount that I have is just a collection from the Bank of America, balance due on a contract. I don't have the data as to what particular contract that is.

Mr. Miller: No further questions.

Redirect Examination

Mr. Anixter: Q. Mr. Hammer, how much does this show that the trustee received from the repair of the General Black?

A. \$543.90 on November 30th, 1955.

(Testimony of Louis Hammer.)

Mr. Anixter: That is all.

Mr. Miller: Well, do your records show whether that was the result of renegotiation or simply a payment on the amount admittedly owed?

A. It doesn't show in the accounting records that I have available here.

Mr. Miller: I see. No further questions.

The Court: That is all. Witness excused. [8]

SAMUEL MENDELSON

a witness called on behalf of the plaintiff. Sworn.

The Clerk: Please state your name to the Court, sir.

A. Samuel Mendelson.

Direct Examination

Mr. Anixter: Q. Mr. Mendelson, what is your occupation?

A. I am a Certified Public Accountant.

Q. And, Mr. Mendelson, did you at my request examine the books of Mechanix, Inc.?

A. Yes, sir, I did.

Q. And what were you requested to look for?

A. You specifically requested that we not do a complete examination but just take the books and records and determine the question of solvency as at February 28th, 1953, which we did.

We examined the books and records maintained by the bankrupt corporation. We examined certain documents on file in the office of Burton J. Wyman, the Referee in bankruptcy, and I prepared a balance sheet from the books and records as they stood, and then I have adjusted certain figures

(Testimony of Samuel Mendelson.)

therein from the information on file in Judge Wyman's office.

Q. Do you have a copy of that balance sheet?

A. Yes, sir, I do. [9]

Q. This is the one you are using now?

A. Well, I have some extras (handing documents to counsel and the Court).

Q. Now, Mr. Mendelson, this is the original of the balance sheet?

A. Yes, sir, that is the original.

Mr. Anixter: I would like to introduce this into evidence as plaintiff's exhibit A.

The Court: All right, admitted.

(Balance sheet admitted into evidence as Plaintiff's Exhibit No. 1.)

Mr. Anixter: Q. Now Mr. Mendelson, as a result of your examination at this time what do you find the condition of the corporation to be?

A. Well, in examining the books and records, the corporation had a deficit capital position of \$33,955.75. Upon examining the files in the Referee's office, that was adjusted upward by some \$26,755.97, making a total deficit of \$60,711.72.

Q. And what was the reason for this upward adjustment?

A. Well, there were certain items for example, as I read from my prepared schedule on the last page. The inventories for the records were \$4,095.00, but the bankruptcy schedules as appraised indicated that they were worth only \$2,000.00.

And there were certain priority wage claims

(Testimony of Samuel Mendelson.)

which were not recorded in the books and records for \$3,633.09. Certain tax claims from the United States Government and the State of California were recorded on the books at \$8,255.59, but the files indicate that the claimed amount was \$26,081.24.

There was a claim by the United States Government accounting office for \$1,120.00 that was not reported.

The notes payable to the Bank of America per the books was \$54,888.57, and the schedules in bankruptcy indicated that the obligation was \$73,029.92.

The just general trade creditors, the books indicated \$145,667.21, and the files indicate \$157,707.02.

Those were the total increases in obligations. Now, there was decrease noted because the books and records disclosed an overdraft position of \$18,686.02, whereas the trustee's files indicated that an on-hand amount when the trustee took over was \$9,412.91, so I have adjusted that overdraft position to make another net adjustment of \$26,755.97.

Q. Then as of this time, if I understand you correctly, there was a net deficit of \$60,711.72.

A. Yes, sir.

Q. Now, did you examine the claim docket on file in the Referee's office? A. Yes, sir, I did.

Q. What are the total amount of claims that have been filed in the bankruptcy proceedings?

A. The Referee's file indicates that priority claims [11] totalled \$30,834.33; unsecured claims, \$160,665.65; the total claims on file of \$191,509.98.

(Testimony of Samuel Mendelson.)

Q. Now, in examining — by the way, did the books show a withdrawal of these checks for \$1500.00 in favor of the defendants?

A. May I examine this paper?

Q. Yes. In favor of Sims and Morrow?

A. Yes. I have here the payroll sheet which is dated—it says “To J. M. Sims, retroactive 1/4/53, 3/8/53, salary due at \$150.00 a week, a total of \$1500.00.”

Now there are deductions of social security, taxes, and withholding, and net withdrawal on check number 4891 for \$1172.50.

The Court: What was the date of the check?

A. I am not certain. This record indicates 3/8/53. The payroll was being written on the 15th, and I would presume from this that this was drawn on the 15th day of March, 1953.

Mr. Miller: We ask that last statement be stricken, the presumption.

The Court: Well, when I consider this, the figures will indicate.

Mr. Miller: Actually, I think it was drawn on the 8th.

Mr. Anixter: I think we can agree it was.

Mr. Miller: The Receiver was in possession by the 15th.

The Witness: A. The following check is check [12] number 4890, and that is drawn to M. D. Morrow, and the same statement is there, “Retroactive 1/4/53, 3/8/53, balance of salary due at \$150.00 a

(Testimony of Samuel Mendelson.)

week, total of \$1500.00," and the necessary deductions, and a net of \$1172.50.

Mr. Anixter: Q. Now, Mr. Mendelson, your statement here was prepared as of February 28, 1953? A. Yes, sir.

Q. From your examination of the books and the court records, would you say that was substantially a correct statement of the company's position as of March 8th, 1953?

A. I can't see that there would be any radical change, Mr. Anixter.

Q. Well, you would say this was a fair statement of it, then? A. Yes, sir.

Mr. Anixter: That is all.

Cross Examination

Mr. Miller: Q. Mr. Mendelson, after you looked at the Referee's file in this matter, did you make any attempt to verify any of the statements set forth in the files or any of the claims filed?

A. As to the amount, sir?

Q. Yes.

Q. No, sir, I did not. Mr. Anixter asked specifically that [13] I just examine the records to determine the total claims filed and the books and records to determine what they disclosed.

Q. Did you examine the schedule filed by the debtor corporation? A. Yes, sir, I did.

Q. And did you note the summary, the end of the schedule following Schedule B, showing liabilities of \$234,502.79 and assets of \$260,133.12?

(Testimony of Samuel Mendelson.)

A. Yes, sir, I saw this schedule.

Q. And you note that that schedule B, 3-A, there were debts due on open accounts as scheduled in the sum of \$203,720.21? A. Yes.

Q. And in your report you schedule accounts receivable \$150,560.06 adjusted?

A. There are no adjustments, sir.

Q. Pardon?

A. There are no adjustments to accounts receivable.

Q. I am sorry. Oh, no. You have total assets of \$201,342.92. A. Yes, sir.

Q. Can you explain the difference in those figures?

A. Well, I have discussed this matter with Mr. Anixter, and there were certain items he indicated that the bankrupt corporation had claimed against the United States Government for ship repair contracts. There was a letter in the file which [14] I saw which indicated that there were certain items the corporation felt were due it, but on the strength of that in preparing the financial statement I could not put out a financial statement solely on the basis that an item is claimed.

We would have to have far more evidence than that to support the inclusion of an account receivable unless it was validly put in there.

We would prefer to put a financial statement out of that kind indicating a claim valued at one dollar for the purposes of the statement, so that at a subsequent time when it was determined to be

(Testimony of Samuel Mendelson.)

good, then it could be included at its realizable value.

Q. Another way of doing it is to try to verify the account with the debtor, isn't that correct?

A. Well, that is true. You can confirm the account with the debtor and see if its amount is owed.

Q. Did you attempt to do that, Mr. Mendelson?

A. No, sir, I did not.

Q. Did you value the claim at one dollar?

A. I did not.

Q. You took the figure that was suggested—

A. (Interposing): I took the book figures that had been recorded up to February the 28th.

Q. Did you talk with Mr. Morrow or Mr. Sims or any of the [15] former officers or employees of the company—

A. (Interposing): No, sir.

Q. —regarding the extent of that claim?

A. No, sir, I did not.

Q. Did you discuss it with Mr. Anixter?

A. Yes, sir.

Q. Did you discuss it with anyone else?

A. No, sir.

Q. Were you told that the claims were being renegotiated with the Government?

A. No, sir, I did not. No one told me that.

Q. Does the job under the name of "The Union" mean anything to you?

A. Mr. Anixter asked me to look at the accounts receivable and see if it indicated there anything

(Testimony of Samuel Mendelson.)

on the Union. I found a ledger page on which the account balance was zero.

Q. Did you inquire as to whether or not the Union contract was subject to renegotiation?

A. No, sir.

Q. In checking the books of the company did you observe that 98 out of 100 jobs performed by the company had been renegotiated?

A. No, sir, I didn't.

Q. And that additional payments had been received?

A. I had not made that detailed an examination. [16]

Q. If I understand correctly, this statement of accounts receivable, contracts receivable, \$150,-560.06 as set out in your report—

A. Yes, sir.

Q. —under date of April 26, 1956, is what you determined the amount to be without regard to any contracts that were subject to renegotiation.

A. I accepted the books and records as they were presented and completed.

Q. Did you see any records at all that referred to renegotiable contracts?

A. The only thing that I saw was this letter sometime in January which indicated that they were dissatisfied with the way the contract had turned out and they asked for some additional monies.

Q. When you talk about the books and records, you are speaking of this statement that you pre-

(Testimony of Samuel Mendelson.)

sented, Exhibit 1? That is what you took off the bankruptcy books, is that right?

A. Yes. Those books and records were completed as of the 28th day of February and I took them as they stood.

The Court: Now the attorney is probably talking about something outside the record or books. Did you examine anything outside the books?

A. No, sir, I didn't.

Mr. Miller: Q. Were you told by Mr. Anixter that the [17] trustee had hired Mr. Morrow and Mr. Sims on a salary following the bankruptcy to assist in renegotiating contracts?

A. No, sir, he did not tell me.

Q. If I understand it correctly—I think this will sum it up—you were not advised to give any consideration to renegotiable contracts, nor did you give consideration to renegotiable contracts.

A. No, sir, I did not. But if I may point out one thing, Mr. Miller, you have in the schedule an estimated accounts receivable figure of \$203,000.00. I have in the statement a hundred and fifty thousand. Should those accounts receivable be adjusted, assuming that we would adjust them to the figure that the bankrupt filed, they would still be in a deficit position of about \$7,000.00, from the books and records. You have a net capital deficit of some \$60,000.00. You deduct fifty three thousand from that, you still have a deficiency position of seven thousand odd dollars.

Q. Well, does this take into consideration the

(Testimony of Samuel Mendelson.)

possibility of the income taxes being adjusted?

A. No, sir.

Q. And refund made to the corporation?

A. No, sir.

Q. To what extent would the corporation or might the corporation be entitled to recover income taxes paid to the United States Government for the years preceding 1953? [18]

A. The only tax return that I saw indicated that they had paid some sixty six hundred dollars.

Mr. Anixter: That is for what period?

A. For the period ended February 28th, 1952. I would imagine, if these books and records are complete, that that sum would be recoverable. But I wouldn't be prepared to state that that is the case unless I was able to pursue the matter a little further.

Mr. Miller: Q. You were not asked to verify that or look at it? A. No, sir.

Q. Now, again referring to these adjustments for example, the United States Government Accounting Office claim of \$1,120.00, do you have anything in your file to indicate the basis for that claim?

A. No, sir, it was just indicated on the files of the Referee in bankruptcy that this was a priority claim filed by the United States Government Accounting Office.

Q. It was not listed in the schedule of the bankrupt? A. No, sir, I didn't see it.

Q. From that you would draw the inference that

(Testimony of Samuel Mendelson.)

it was a disputed claim? A. No, sir.

Q. As an accountant.

A. I don't know the nature of the claim and I could not tell [19] you whether it was disputed or not.

Q. Well, when information reaches you regarding a claim against a company where the claim is not reported on the books of the company, and we will assume a case where you are the regular accountant for the company, would you treat that as a valid claim?

A. No, I would refer to counsel to determine whether the claim is valid. That is not my position to determine whether items claimed against individuals whom I do accounting work for is a valid claim or not. I have to get a legal opinion if there is a dispute.

However, I can point out to you, Mr. Miller, for example, per the schedules in the bankruptcy you indicated that \$8,255.00, or \$8,500.00, as I recall it in round figures, for tax claims. Those tax claims were something in excess of \$26,000.00.

Now I don't believe that the United States Government makes in general erroneous claims. I have at times found that they sometimes will set their sights a little high, but in general——

The Court: All the accountant has done, he has taken what he found in the books of the Referee in bankruptcy and made his calculations, and I wouldn't be particularly interested in his view as to the validity of the claims.

(Testimony of Samuel Mendelson.)

Mr. Miller: No, your Honor, but there was a possibility [20] that these claims are not valid and should be set out as disputed claims rather than liabilities.

The Court: Well, but the witness has merely stated the extent of his labors and it has been limited to what he found in the records.

Mr. Miller: Very well.

The Court: It is worth what it is worth as a statement of what is in the record.

Mr. Miller: And we want to be sure about the source of his information. And also what he does in other cases might shed some light in this situation.

I have no further questions.

Redirect Examination

Mr. Anixter: Q. Mr. Mendelson, you were asked about tax refunds. A. Yes, sir.

Q. They would only be entitled to a tax refund on the 1952 taxes if they were running at a loss in 1953, is that correct? A. Yes.

The Court: You mean by offsetting subsequent years.

A. Yes, sir. You are permitted to carry back the losses.

Mr. Anixter: Q. Now in going over the books of the corporation you came across these various jobs that the company had been doing? [21]

A. Yes, sir.

Q. And were there any figures set up as ac-

(Testimony of Samuel Mendelson.)

counts due from the Government on these jobs which corresponded to the figures filed in the bankruptcy proceedings?

A. Well, you specifically asked me, Mr. Anixter, the Union job.

Q. Yes.

A. And I will refer again to their books and records under the United States Navy. I find a page here indicated "U. S. Navy" and then in parentheses A. I. M. I don't know what that indicates. But on November 20th, 1952, I have an entry, a debit entry for \$325,216.00; and on the 26th day of January, 1953 I have a final cash payment on that debit of \$22,948.25, and the account is zero. There are no other postings.

Q. As far as their records show then, that account is completely paid up? A. Yes, sir.

Q. And Mr. Mendelson, as a matter of accounting practice if you were informed that the company whose books you were auditing had several disputed claims against anybody, whether the Government or anyone else, how would you list those claims?

A. Well, as I stated to Mr. Miller, if there were claims of any kind where there was litigation involved we generally tried to get an opinion by the attorney of the company as to [22] the validity of the claims. If there is great doubt as to the collectibility of any item, we would merely footnote the financial statement to the effect that there was a claim pending against a certain company.

(Testimony of Samuel Mendelson.)

The Court: Mr. Anixter, I don't see the materiality of this. Was there some examination conducted in the bankruptcy court with respect to the claims—with respect to claimed assets of the bankrupt which were collectible of this nature.

Mr. Anixter: Yes.

The Court: This witness took no part in that?

Mr. Anixter: No, he didn't take any part in that. But I am trying to bring out that as a matter of accountancy practice in valuing the assets of a company for the purpose of the determining whether it is solvent, whether they have saleable assets to meet their liabilities, how an asset of this kind would be regarded, because it is unquestionable that without this particular type of asset this company was hopelessly insolvent.

The Court: Well, I rather gathered from some questions Mr. Miller asked that he might be making some contention that although the company was adjudicated—there was an involuntary petition, was there not?

Mr. Anixter: Yes.

The Court: Nevertheless, he might be making some contention that there were some other assets, unliquidated, [23] in the form of claims against the Government that might have a bearing, if they were correct, on the validity of the claims for the refund of these payments to the two officers.

But I don't see what light the accountant can throw on that. That is what prompted my questions. He must have conducted some examination

(Testimony of Samuel Mendelson.)

in the bankruptcy court as to the nature of any such claims. Was there?

Mr. Anixter: Yes, there was, and I am going to present a legal opinion later on the value of these claims.

The Court: All right.

Mr. Anixter: Q. Now Mr. Mendelson, you were asked several questions by Mr. Miller about the renegotiation or information you received. Now so far as you know there hasn't been any renegotiation requested by the Government?

A. None that I know of.

Q. You merely took your examination from the books and records of the company and the bankruptcy record? A. Yes, sir.

Mr. Anixter: That is all.

Mr. Miller: Just one more question: What was the net income of the corporation for the year ending February, 1952, as indicated on the Federal tax return.

A. I don't have it. Excuse me, I will get it.

(Witness left stand and returned.)

I have here a United States Government corporation income [24] tax return indicating the fiscal year beginning March 1st, 1951, and ending February 29th, 1952 and it shows per the attached schedule a net income of \$22,501.08.

Mr. Miller: Thank you, Mr. Mendelson. I have no further questions.

The Court: That is all. Witness excused.

Mr. Anixter: The trustee rests.

Mr. Miller: I move for dismissal, your Honor, on the ground that there is no showing at this point that the defendants who received the money did so with knowledge of any insolvency. This is all subsequent to the time of the payment, which counsel and I both agree was March 8th, 1953.

We submit the matter, your Honor, and ask for dismissal.

Mr. Anixter: If it please the Court, it has been established that these two defendants were the president and secretary respectively, of the corporation, directors of the corporation and shareholders of the corporation, and between them owned and operated the corporation.

The statements from which the accountant testified was prior to that time, and at about that time, and as testified to him reflected the condition as of March 8th when the payment was taken by them; and I will submit that the officers and directors of the corporation are presumed to have knowledge of the affairs of the corporation, and they certainly are chargeable with such. [25]

If the corporation is insolvent at that time, the officers and directors certainly know it. You don't have to prove anything further from an officer, director and shareholder of the corporation.

Mr. Miller: I should think you have to go this far, your Honor, and show that the defendants had in their possession and available to them a balance sheet which would reflect the condition. We don't know. We of course aren't in the business. We are attorneys.

But our clients don't know the exact condition of their business or everything about the affairs of this particular business except as it comes to them through statements furnished to them by accountants, and we know that those statements are usually involved anywhere from ten to thirty days following the close of the particular business.

We may be familiar generally with the affairs, that's true, but we don't know at that time whether or not a particular business is solvent or insolvent.

And there is no showing here that these men knew that the company was insolvent or that they had this information furnished to them prior to the time that these checks were drawn.

We submit that there is no showing, no evidence from which an inference could be drawn that would charge these men with knowledge of insolvency, if in fact it was insolvent. [26]

I submit, your Honor, that the motion to dismiss should be granted.

The Court: Mr. Miller, wouldn't there be a reasonable inference that when the officers of the company, about a week prior to the filing of an involuntary petition for bankruptcy for long past due monies owed, there is a reasonable inference that they knew that there was some need for getting this money out at that time? I am just speaking in terms of the *prima facie* showing.

Mr. Miller: Of course I may be thinking a little bit ahead, your Honor, of the reason why and how it happened that the money accumulated.

The Court: It is *prima facie*, but I think if that

is all that would be sufficient to decide the motion to dismiss. There is no question that these claims would have priority?

Mr. Anixter: Yes.

Mr. Miller: There is that other question, your Honor, a matter of defense. These claims were for salaries, not for compensation as officers and directors, but for actual salaries earned by these men, by Mr. Morrow as sales manager and by Mr. Sims as plant manager and superintendent.

The Court: How much was it? \$150.00 a week?

Mr. Miller: \$150.00 a week. Of course there was a maximum of \$600.00, isn't that correct, that could be subject to priority? [27]

Mr. Anixter: The limit of the amount that could be claimed as a priority would have been \$600.00 in each case. But of course there is a substantial question of law whether or not an officer and director is entitled to a wage claim as priority.

Mr. Miller: I don't believe he would be entitled to it as an officer or director.

Mr. Anixter: Well, there are several cases on this. It is a question that has been disputed on a number of occasions and something on which I was going to submit authorities if that gets to be a point.

Mr. Miller: That is satisfactory, your Honor.

The Court: So there might be six hundred of the eleven hundred odd dollars that might be a priority claim?

Mr. Miller: That is correct.

The Court: And there would be assets sufficient

to take care of the priority? They have been paid, haven't they?

Mr. Anixter: Apparently some of them have been paid, but not all of them. Some of the priority claims which are still on file is one by the Labor Commission for wage claims.

The Court: Is that large?

The Witness: A. It is over \$3,000.00.

Mr. Miller: I understood that had been paid.

The Court: Anyway, the money on hand is more than sufficient to pay the wages, but only enough to pay a very small dividend. [28]

Mr. Anixter: I think it would be, yes.

The Court: Well, I will reserve ruling on the motion to dismiss and you can present the evidence.

Mr. Miller: Mr. Morrow.

MARVIN MORROW

called as a witness on behalf of the defendants.
Sworn.

The Clerk: Please state your name to the Court.

A. Marvin Morrow.

Direct Examination

Mr. Miller: Q. Mr. Morrow, you are one of the defendants in this case, is that correct?

A. Yes, sir.

Q. And you were one of the original stockholders of Mechanix, Inc.? A. Yes, sir.

Q. And Mr. Sims is the other principal stockholder, is that correct? A. Yes.

Q. When was the company formed?

A. The company was formed in early 1951. I

(Testimony of Marvin Morrow.)

think it actually commenced operations in about March of 1951.

Q. And what type of business did it conduct?

A. Well, we did machinery installation, shipping repairs, most generally having to do with ships and related machinery and equipment.

Q. Where was the company located?

A. Pier 20, San Francisco.

Q. Were you an officer of the corporation?

A. Yes, sir.

Q. What was your title?

A. I was the president and acted as sales manager.

Q. Were you employed by the corporation?

A. Yes, sir.

Q. In what capacity?

A. As a sales manager. I obtained the work or contracts that we worked on.

Q. And during the period January 4th and 5th, 1953, through March 8th, 1953, what salary were you entitled to receive?

A. We were entitled to \$300.00 a week that we had set up on the books of the corporation.

Q. How much time did you devote to the enterprise?

A. Well, it is awfully hard to determine. I imagine that I would devote, oh, perhaps sixty or seventy hours a week to the company.

Q. How would this time be spread?

Mr. Anixter: I will object to that on the grounds that it is incompetent, irrelevant and im-

(Testimony of Marvin Morrow.)

material. I don't see [30] what the materiality is. He worked for the company, no question about it.

Mr. Miller: Well, as long as we have a stipulation that his compensation was for his wages as an employee and not compensation as a director or officer, Mr. Anixter, that is the point I am making.

The Court: Ask him what the nature of his services were. What kind of work did you do?

The Witness: A. The nature of my work was to negotiate for the work with the various agencies for whom we worked, both private and Governmental; to keep apprised of the jobs which were in the offing, let's say; to know the trade; to meet with the people who could give you their business or could allow you to bid upon that business.

You see, we were under contract with the Government under four master contracts.

The Court: Did you let subcontracts?

A. Yes, we let subcontracts, also.

The Court: Who had charge of that?

A. I let some of the subcontracts and Mr. Sims let the rest of them, and Mr. Barron, of course, our office manager, would let the rest of them.

The Court: Did you have anything to do with the supervision of the work itself or was your work primarily devoted to sales? [31]

A. My work was devoted more to sales and sales management.

The Court: How much of your time did you spend on that?

(Testimony of Marvin Morrow.)

A. Oh, I would say ninety per cent of my time would be spent on that.

The Court: Excuse me for interrupting your examination.

Mr. Miller: Yes, sir.

The Witness (Continuing): —and in negotiation of the job afterwards. You see, I think Mr. Miller mentioned previously that out of all the contracts that we had from the inception of the company to the end——

Mr. Anixter (Interposing): I submit this is not responsive.

The Court: Yes. You go ahead, Mr. Miller.

Mr. Miller: Q: Did your company have occasion to renegotiate contracts for ship repair work?

A., Yes.

Mr. Anixter: Just a moment. I will object to that on the ground that it is incompetent, irrelevant and immaterial, it calls for the opinion and conclusion of the witness, and it is not based on any proper foundation. Renegotiation is something that was demanded by the Government, not by any company, and I think a foundation should be laid to try to determine whether or not the Government is demanding any renegotiation of these contracts.

Mr. Miller: Well, maybe we are using the word "Renegotiation" [32] ill-advisedly, your Honor.

Mr. Miller: Q. In your contracts for ship repair work, were there occasions when there was

(Testimony of Marvin Morrow.)

work done in addition to that set out in the contract?

A. That is what I was about to state, that in probably ninety per cent of the cases that we had the ultimate figure that we received for the contract, that is, the pay we received for the job, the total job was far greater than the original contract set out in the bid.

Q. How would that come about?

A. That would come about by the opening of what they called "Extras" on the job. In other words, extra work found to be necessary to complete that job to its end that it served whoever you were working for.

Q. Would these be found by your company or inspectors of the Governmental agencies or both?

A. It would be found by both of them because, you see, they employed the inspectors on the job and they would order the work done, of course, and we did the work, and we would only be paid for it later after we put in our bill for it.

Q. Now, were there occasions when you had to negotiate, as distinguished from renegotiate, the amount of the bill for the extras?

A. Almost every one.

Q. During the time that your company was in operation, [33] approximately how many ship repair jobs did you do for these Governmental agencies?

A. Well, it was over a hundred, I would say, in my opinion. It is hard for me to calculate that

(Testimony of Marvin Morrow.)

because we did private jobs also on which they was extra work. And some of that was subsidized by the Government, I mean, operating ships under subsidy by the Government.

Q. What percentage of those jobs were subject to negotiation for extras?

Mr. Anixter: I submit that that is incompetent, irrelevant and immaterial, and has nothing to do with this matter. It doesn't involve any of the contracts they are claiming are due. It is just going into a lot of general situations.

Mr. Miller: Your Honor, there is another point involved, too. I am sure the Court is interested in finding out how it came to pass that these men were paid March 8th rather than weekly, and I think we are entitled to bring in evidence to show money accumulated, received in one lump sum at a particular time.

The Court: Well, all right, I will allow the question.

Mr. Miller: Q. What percentage of your jobs were subject to negotiation for the extra work?

Mr. Anixter: Well, I submit that that is——

The Court (Interposing): Well, that's pretty general.

Mr. Miller: All right. [34]

The Court: Can't you get right down to the fact of what the situation was on March 8th?

Mr. Miller: Yes.

Q. I call your attention to the period between January 1st, 1953 and March 8th, 1953. Did you

(Testimony of Marvin Morrow.)

have contracts at that time that were subject to negotiation for additional work?

A. Oh, yes. I believe that some of those are still open.

Q. Now, you paid your men on a weekly basis, is that right?

A. Yes. That's the Union contract.

Q. Did you get paid on your contracts on a weekly basis? A. No, sir.

Q. When did you get paid?

A. We got paid whenever we could finish the settlement of the job with the particular agency, we were working for, or with their negotiators or inspectors. We would have conferences on each particular job at the end of the job.

Q. Each particular job would be handled on its own merits, is that right? A. Oh, yes...

Q. Would it take more than a week after the job was completed?

A. Well, just for instance, we were hired after we left Mechanix, Inc., we were hired by the Board of Trade to assist in the negotiation of contracts still open. We worked for a month or so on that particular work. [35]

Q. Now, during this period from January 1953 to March 8th, 1953 I think you said you had contracts that were open for negotiation?

A. Yes.

Q. As a result of that having contracts open for negotiation was your corporation without sufficient

(Testimony of Marvin Morrow.)

funds, cash, to pay your salary and that of Mr. Sims?

Mr. Anixter: I object to that on the ground that it is incompetent, irrelevant and immaterial, calls for an opinion and conclusion of the witness as to why he was not able to pay it, and whether or not because of so called renegotiation, which is a word that is being idly used here, they could pay or not. I don't see what bearing it has.

Mr. Miller: We will use the word "Negotiation," instead of "Renegotiation," your Honor.

Mr. Anixter: Even then there has been no foundation laid for any negotiation matter. They haven't even established a contract which sets forth how negotiations would be opened or that they have even complied. We understand the contract provides they have to get an authorization in advance for extras, and there is no evidence they even attempted to.

The Court: Well, these matters I take it, were examined into in the bankruptcy proceedings. There must be some reason for the fact that there is only a small amount of money left to pay a large amount of creditors. The testimony [36] shows you paid most of the secured creditors, and there is \$27,000.00 left and there is \$191,000.00 worth of creditors' claims on file. Is that right?

Mr. Anixter: Yes, that is correct.

The Court: Now, where did that money go?

Mr. Anixter: What money?

The Court: Well, these assets. A hundred and

(Testimony of Marvin Morrow.)

fifty five thousand dollars worth of current assets.

Mr. Anixter: Your Honor, we show they are merely claims that were in the minds of these people.

The Court: Well, it shows contracts receivable of \$150,000.00, of which according to the statement here, \$150,000.00 was payable to the bank. I suppose that is what is meant by "Partially pledged."

Mr. Miller: Yes, the bank had a pledge that was a receivable.

The Court: I don't quite understand what we mean by general observations as to the nature of the business. The question is, what was the financial condition at the time, isn't that so?

Mr. Miller: Well, we are trying to put in specific——

The Court: It appears to be useless for me to hear the witness testify as to the general nature of the business unless it appears that there is——

If this offered that there was no showing that there was [37] no bankruptcy at the time? That there was solvency?

Mr. Miller: It has always been our position that it was solvent, your Honor, although we must confess that there has been an adjudication.

The Court: Well, that would have to be proven——

Mr. Miller: Yes.

The Court: ——or the evidence would have to concern itself specifically with the items that were

(Testimony of Marvin Morrow.)

involved, not general statements about it.

Mr. Miller: But we are entitled to show that these men believed the corporation to be solvent at that time.

Mr. Anixter: Oh, your Honor, please, "They have to show"? They have to show that it was solvent.

For example, the mere showing that these people honestly believed that these claims were due from the United States, and even though, as the accountant's testimony shows, it still wouldn't be enough to pay the obligations, that still wouldn't make them solvent because under the Bankruptcy Law the definition of solvency is whether or not the aggregate value of their assets would be sufficient to pay their obligations, and if they merely had claims that were not reducible to cash, even those claims would not make them solvent unless they were outright accounts receivable rather than disputed claims against the Government.

Mr. Miller: It goes a step further, your Honor. Not [38] only must the corporation be insolvent, but the creditor receiving the payment must have knowledge of the insolvency.

Now if these men honestly believed that the corporation was solvent rather than insolvent, then they could not know that the corporation was in fact insolvent, if that be the case, so therefore their belief as to the solvency or insolvency becomes material.

The Court: Well, that would be self-serving,

(Testimony of Marvin Morrow.)

wouldn't it, to say "I thought we were solvent"?

Mr. Miller: Well, that is why I am trying to develop the facts of it, your Honor, rather than just the mere opinion and statement by the defendants that they believed it.

And we must further dispel any inference that the Court may draw from this payment of March 8th, 1953, by showing that the money came in at one time.

The Court: Well, there must be some reason for the filing of this involuntary petition here on the 13th of March.

Mr. Miller: Oh, yes.

The Court: There must have been some impending proceeding, some black cloud on the horizon, at the very time that they paid themselves this money. Although there is always the eternal hope that something is going to work out in these matters. Lawyers are familiar with that.

But we have gotten a little bit far afield from the precise question. If you wish the witness to testify as to [39] his knowledge of the condition of the company on March 8th, 1953, of course you have a perfect right to go into that.

Mr. Miller: I want to do that, your Honor. And I also want to let the Court know on what he bases his statements rather than just a bare statement of his opinion.

The Court: Well, we have gotten away from the question. Suppose you reframe another question.

Mr. Miller: Yes, your Honor.

(Testimony of Marvin Morrow.)

Q. Mr. Morrow, you were familiar generally with the affairs of that corporation and the company during its period of operation, is that right?

A. Yes, sir.

Q. Calling your attention to March 8th, 1953, did you know or believe that this corporation was insolvent and would not be able to pay its debts?

A. No, sir.

Mr. Anixter: Well, that is calling for his opinion and conclusion.

The Court: Well, it's a factual question.

Mr. Miller: Factual question.

The Court: Subject to — entitled to whatever weight the Court can give it.

Mr. Miller: Q. You were familiar generally with the nature of the assets of the corporation, were you not? A. Yes, sir.

Mr. Miller: Mr. Anixter, may I have that schedule? We are going to use Mr. Anixter's office copy of the schedule, your Honor, rather than bring in the whole trial from the Bankruptcy Court.

Mr. Miller: Q. I show to you the schedule of affairs filed by the corporation in the bankruptcy proceedings, and I direct your attention to the assets which are listed in Schedule B -3-A-1, a total of \$203,720.21, and I note that you signed this schedule. A. That is right.

Q. And I ask you to tell us at this time on what you based the statement that the corporation had that asset. A. Yes, sir.

Mr. Anixter: Well, I submit, your Honor, what

(Testimony of Marvin Morrow.)

he bases it on is not relevant or material, but what the books show he got it from.

The Court: Well, I will allow the question. Recovery of preferences, particularly when it involves the payment to the officers of the company as distinguished from creditors, as is the usual case we meet—I will allow it.

The Witness: A. The type of jobs upon which we worked—I will have to go back to the start of the company—grew naturally in size with the progress of the company.

Now, previous to November of 1952 the largest job we handled ran up to something like, let's say, a hundred thousand. [41] Now, with the negotiations of extras on it it might run up to a hundred and fifty thousand. I don't recall the exact figures. It was an aluminum decking job we did for the Navy—incidentally, on which we received an award for doing good work.

Now, in November of 1952 we bid upon and were successful in the bid of a job which ran over three hundred thousand.

Now, the negotiation of the extras on all of our jobs prior to the Union—the Union is the big one I am talking about in November, 1952—required two, three, four months to obtain our money so that we could pay back the bank and so that we could pay back the creditors, and so forth.

Now, we were not allowed to have the time to negotiate out the Union when the petition in bankruptcy was presented. We didn't even have the

(Testimony of Marvin Morrow.)

time to accumulate our data on payroll and accumulated material, to say nothing of present our claim to the Government. We had to estimate it on the basis of what we could see.

It takes hours and hours of time. That is part of my job, part of the office manager's job. It is part of Mr. Sims' job, who is superintendent, to calculate those hours.

We had to estimate a lot of that because, you see, the Union grew from three hundred thousand to, let's say, over five hundred thousand in our opinion. [42]

The Court: Do you say that after the bankruptcy there was still some amount due, according to your contention, from the Government on this contract?

A. Yes, sir.

The Court: After the bankruptcy did you take any part in assisting the trustee or receiver assemble data to present and accomplish the recovery on that claim?

A. Your Honor, I assisted in the recovery of money on an Army transport job and two or three others with the MSTs. I didn't on the Union, because they didn't give us time. We had five or six jobs we still——

The Court (Interposing): You are going too fast for me. You said that on the Union contract there was money that you thought was due your company from the Government on that contract? A. Yes.

(Testimony of Marvin Morrow.)

Q. What did you personally do about that?

A. We didn't personally do anything after the bankruptcy, because they took all of our books. They took everything, lock, stock and barrel.

The Court: Didn't the trustee call upon you to assist in getting up the data?

A. Not on the Union. They didn't call for us to negotiate one single thing on the Union. They called for us to negotiate on the Army transport job, the name of which escapes me, but [43] I could get it from Mr. Sims.

The Court: You did on some of the jobs?

A. Yes, sir.

The Court: And was recovery made by the trustee on those? A. Yes, sir.

The Court: Well, what happened to the Union?

A. Well, the Union is still open. It's still negotiable. That cannot be disputed.

The Court: How much would that amount to?

A. Pardon? Oh, I don't have the breakdown here, but I think the negotiations for the Union, what we have recoverable, is over a hundred thousand. I mean, I don't know exactly, because it has been a long time. It has been three years.

The Court: You say you could have recovered a hundred thousand dollars more from the Government?

A. Yes, sir. Possibly more.

The Court: And none of that has been recovered?

A. No, sir. Those are extras due over and above

(Testimony of Marvin Morrow.)

the contract. Now, we received monies from the Union. But, you see, the Union was a job that I think we originally scheduled to finish in November of 1952, or maybe the early part of December, but we didn't finish until January of 1953, and we didn't have time to negotiate. It's a small company. We do a lot of things like sweeping the floor, things like that. We don't [44] have a lot of help. We don't have a large staff. We have to negotiate our own paper. Between January of 1953——

Mr. Anixter: I submit we are getting very far afield.

The Court: You are telling me the Government really owes you or this company a hundred thousand dollars that hasn't been collected?

A. Yes, sir. In our opinion that's what they owe us. That's based upon the extra work which we did for which we did not receive payment.

The Court: Well, you probably may have some more questions?

Mr. Miller: Yes.

The Court: We will take a brief recess.

(Short recess.)

Mr. Miller: Q. Mr. Morrow, was there a shortage of cash in the company during this period between January, 1953, and March of 1953?

A. I would say a shortage of working capital, yes.

Q. And that was due to the fact that you had jobs that were subject to negotiation, is that correct?

A. Yes, sir.

(Testimony of Marvin Morrow.)

Q. And had you received or had on hand the cash that you claim is represented by the accounts receivable, and which in turn were based upon negotiations which you say you had with the various governmental agencies, you would have had sufficient [45] cash, working capital, to operate it at the time? A. Yes.

Mr. Anixter: I submit that is incompetent, irrelevant and immaterial; calls for the opinion and conclusion, and a self-serving statement. He doesn't ask if there were any monies due on the contract, but he said if he had all the money he claimed was due.

The Court: Well, that is what he said. He said if he had all the money he claimed was due, he would have had sufficient money to operate.

Mr. Anixter: But there is no foundation laid that the money was actually due.

Mr. Miller: Well, that's the question.

The Court: Yes, but that is the extent of his answer.

Mr. Miller: Q. Mr. Morrow, did the corporation received payments during March of 1953 on account of its work, either in progress or work that had been completed? A. Yes, sir.

Q. Did that money that you received furnish you with sufficient capital to allow the corporation to pay you and Mr. Sims the wages that were owing for this period beginning January 4th or 5th through March 8th of 1953? A. Yes.

(Testimony of Marvin Morrow.)

Mr. Anixter: That is incompetent, irrelevant and immaterial. [46]

The Court: Well, obviously the money must have come in.

Q. (By Mr. Miller): The money was there?

A. Yes.

Q. Did the corporation have sufficient cash on hand prior to March 8th, 1953, to enable the corporation to have paid you and Mr. Sims?

A. At what time?

Q. Between January of 1953 and March of 1953, which is the period covered by this payment of \$1500.00.

A. Of course a different amount would have been owed in January than in March, naturally, or in February.

The Court: What was the last time that you and Mr. Sims received any payment for salary or compensation due you prior to March 8th?

A. Well, we received the wage right along we had agreed upon at the beginning, which we had never increased.

The Court: Well, that doesn't answer my question.

The Witness: Each week.

The Court: On March 8th there was \$150.00 paid each of you?

A. Yes.

The Court: Well, it required discussion. Prior to that time when was the last time you received any money for services?

(Testimony of Marvin Morrow.)

A. I think we had been paid each week.

The Court: How much? [47]

A. Our regular salary which was \$150.00 a week.

The Court: What was this 150 for?

A. This represented a raise which we had given ourselves on the first of the year, 1953. Or we had settled upon this in 1952, of course, but set it on the books in 1953.

The Court: Now, at any time since January, since the time you increased your salary, had the amount of that raise been paid to you since you had agreed upon it? A. No, sir.

The Court: This was, then, an accumulation of what you say was a raise that was finally paid to you on March 8th, 1953, is that a correct statement?

A. Yes, I would say so.

Q. (By Mr. Miller): And when had that raise been decided upon, Mr. Morrow?

A. Well, we had actually decided upon it in 1952, but we hadn't put it on the books until 1953. I would say perhaps the middle of 1952. I don't know the exact date. It was a verbal thing. We had worked for the same wages since the inception of the company.

The Court: But that doesn't answer the question. I just asked you when it was.

A. Some time, I would say, in 1952. Maybe the summer of 1952. [48]

Q. (By Mr. Miller): You say "we." Who do you mean?

A. Mr. Sims and myself.

(Testimony of Marvin Morrow.)

Q. And what consideration led you to vote yourself the raise?

Mr. Anixter: That is incompetent, irrelevant and immaterial, has nothing to do with the issues of this case.

The Court: Well, no, I don't suppose so.

Mr. Miller: All right.

The Court: Except insofar as—is there anything of record as to that in the corporation books?

A. Yes, I think so.

The Court: Except that it might enter into the—it might be a factor that would go to the validity of the opinion. I mean, I don't know why you would particularly object to that.

Mr. Miller: I realized he hasn't raised the question yet, your Honor, but I thought while I had him on the stand I would ask him. If you don't raise the question, I won't go into it.

The Court: Apparently the trustee is relying entirely upon the claim that the payment was voidable as a payment made in contemplation of bankruptcy. He hasn't said that.

Mr. Miller: I will withdraw the question, then.

Q. Mr. Morrow, during this period from the 1st of January, 1953, to March 8-March 13, 1953, did you as the office manager of the company, or did anyone else acting on behalf of the company, make any attempt to raise additional working capital [49] for the company? A. Yes, sir.

Q. Can you tell what efforts were made?

A. Well, I think the only effort that was made,

(Testimony of Marvin Morrow.)

of course outside of personal inquiries of which I have no record, the only effort that was made was made by a Mr. Al Hood, who of course was employed by Meehanix, Inc. He wasn't an officer.

The Court: Can't you just tell us briefly? What was done?

A. Well, we let Mr. Al Hood, at least Mr. Sims and myself had several conferences with him, and he wanted to become a part owner of Mechanix, Inc. He was going to bring in additional working capital. He knew that if he did——

The Court: Well, did he bring it in?

A. No, he didn't bring it in.

The Court: You made some effort to get additional capital from him, but you were unsuccessful?

A. Well, we went further than that. We had an express agreement with him.

The Court: Irrespective of the nature of it, you made the effort to get additional capital through Mr. Hood, but it was unsuccessful. Is that a fair statement?

A. No, I wouldn't say that. He didn't bring any money up until March, but——

The Court: You didn't get any money from him?

A. No, we didn't, your Honor, but it was still open.

Q. (By Mr. Miller): Mr. Morrow, was it your intention at the time you received this payment on March 8, 1953, to continue in the employ of Meehanix, Inc.?

A. Yes, sir.

(Testimony of Marvin Morrow.)

Mr. Anixter: That is incompetent, irrelevant and immaterial.

A. Yes, sir.

Mr. Miller: I think it is important, your Honor. It could be consideration for the payment as a fact for the Court to consider.

The Court: I would assume that would be the case. Ask another question.

The Witness: I didn't finish my answer.

The Court: Well, I think we have heard enough. I will take it for granted that, whether it is material or not, you were going to continue on in business if you could.

Mr. Miller: Did you want to ask a question, or did you tell me to?

The Court: I will answer it for him.

The Witness: I want to go a little further.

The Court: Well, you weren't going to leave the business, were you?

A. Yes, I was going to leave the company.

The Court: You were?

A. Yes, sir. [51]

The Court: Then I was wrong.

The Witness: I wanted to explain to the Court why.

The Court: Well, what is the materiality of that? Why did you want to bring that out?

Mr. Miller: I think that would be a question of consideration for the payment, your Honor. That's the point I had in mind.

(Testimony of Marvin Morrow.)

The Court: I think there was already perfectly valid consideration for the payment.

Mr. Miller: No, I say as a matter of law, insofar as this proceeding is concerned, a present consideration should take it out of the preference class.

The Court: How could that be when he has already testified it was back payment that was owing from January, \$150.00, as a salary?

Mr. Miller: The point is, he received the payment in order to keep him on the job, which would make it a present consideration.

The Court: I don't think I would go into that. I don't see any merit in that. I don't think a man has to say he is going to stay on the job to get some money that is already owing him.

The Witness: I could explain that.

The Court: You don't need to. I don't think it is necessary. It is only a legal question. If money is owing [52] to you, it is owing to you. A man doesn't have to stand on his head to get something that is already owing him.

Mr. Miller: I have no further questions of this witness.

Cross Examination

Q. (By Mr. Anixter): Mr. Morrow, it is a fact your company closed its books monthly, is it not?

A. Well, we weren't always successful in closing monthly. We tried to.

Q. Mr. Morrow, I will show you a copy of an operating statement of Mechanix, Inc., for Febru-

(Testimony of Marvin Morrow.)

ary, 1953, which was taken from your files, and ask you if you have ever seen that statement.

A. For what period is this?

Q. February, 1953. Operating statement.

A. I mean, is it only for February?

Q. Well, it is your record, operating statement for February.

A. I have seen the statement before.

Q. And this statement shows that the net profit before taxes in February, 1953, was minus \$9,663.12, is that correct?

A. It is perfectly possible in that month, yes.

Mr. Anixter: I will ask that this be introduced as Trustee's Exhibit.

Mr. Miller: We object on the ground it is incompetent, irrelevant and immaterial.

The Court: He has only offered it to show it was an [53] operating statement for that month. I don't know precisely what the materiality is. Well, I will admit it.

(Operating statement referred to admitted into evidence as Plaintiff's Exhibit 2.)

(1) 200

(2) 210

(3) 220

A

B

C

D

(1) 200

A

B

(1) 200

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

X

Y

Z

MECHANIE, INC.
OPERATING STATEMENT
February 1953

64

Revenues from Contracts

\$ 33,962.32

Less direct costs:

Materials for repairs	\$ 8,481.51
Sub-Contracting	2,409.40
Direct Labor	9,284.97
Other direct costs	<u>861.75</u>
Total direct costs	

21,037.63

Gross Profit

\$ 12,924.69

Less Operating Expenses:

Salaries-Admin., Superv., & Clerical	\$ 9,247.08
Rental of Equipment	2,217.00
Maintenance or Replacement of Rental Equipt.	2,250.00
Rental of Pier	1,676.94
Accounting	164.00
Amortisation of Leasehold improvements	154.58
Auto and Travel	13.00
Bridge Tolls	136.75
Depreciation Expense	922.73
Advertising	8.84
Entertainment & Business promotion	673.18
Gasoline, Oil & Fuel	404.85
Insurance	1,148.73
Interest	360.00
Legal	1,225.00
Maintenance & Repairs	573.55
Office Expense	599.12
Telephone & Telegraph	174.62
Utilities	242.04
Losses from theft	375.00
Miscellaneous	20.80
Total Operating Expenses	

22,587.81

Net Profit before taxes

\$ -9663.12

U. S. DIST. CT. N. D. CAL.

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(Testimony of Marvin Morrow.)

Q. (By Mr. Anixter): Now, Mr. Morrow, on January 20th, 1953, you wrote a letter to the Assistant Industrial Manager of the United States Navy regarding the Union, did you not? A. Yes, sir.

Q. Before showing you the letter, I will show you a notation attached to the letter, purporting to be in your handwriting:

“Dear Mr. Hunt: Here is a copy I made of our Union claim. Have you filed one for this job? M. D. Morrow.”

Is that in your handwriting? A. Yes, sir.

Q. And you sent a copy of this letter to Mr. Hunt? A. Yes, sir.

The Court: Who is Mr. Hunt?

Mr. Anixter: He is one of the attorneys in our office.

The Court: This is after the bankruptcy?

Q. (By Mr. Anixter): And this is a copy of the actual letter sent by you?

A. Yes. January, 1953.

Q. Now, it is a fact, Mr. Morrow, that in this letter you claim there was \$70,000.00 due to you?

A. Yes, sir, and that is January, 1953. As I explained before, we were not through with the—

Mr. Anixter (Interposing): Now at this time I would like to offer in evidence a letter dated January 20th, 1953, to the Assistant Industrial Manager, U. S. Navy, Building 11, Yerba Buena Island, U. S. Naval Station Treasure Island, San Francisco, California. Attention Captain E. T. Aldridge, Assistant Industrial Manager:

(Testimony of Marvin Morrow.)

“Dear Sir:

“Confirming my verbal statements to you in December, 1952, regarding the contract that we completed November 20, 1952, on the USS ‘Union’ (AKA-106) it has been confirmed on the basis of our final figures that we suffered a severe loss in the amount of \$70,000.00. We have analyzed the entire contract and figures in relation to the conditions under which the work was performed and therefore seek reimbursement for our loss by reason of acts of the Government or causes beyond the control and without the fault or negligence of the contractor.

“It has long been the stated public policy of the U. S. Navy that the Navy did not want the contractor to ‘go broke’ by reason of conditions imposed by acts of the Government. In our case under the USS ‘Union’ [55] (AKA-106) contract we acted in good faith. It has been reported we accomplished a workmanlike job and furthermore completed the contract on time and without penalty. Since this was our first contract of any consequence with the U. S. Navy, we sincerely endeavored to make every effort towards a satisfactory performance. As a result of trying to completely please the requirements, orders, and desires of the U. S. Navy ship’s force, inspectors, planners and estimators, contract negotiators, progress men, the Assistant Industrial Manager’s personal staff, electronics assistants, designers and others, we were unable to proceed in the execution of contract in

(Testimony of Marvin Morrow.)

the manner and schedule which we had planned. The net result of the confusing Government interference was our financial loss and we respectively request the submission of our claim with the proper authorities immediately for prompt attention.

"Your cooperation is appreciated.

"Very truly yours,

"M. D. Morrow, President."

Mr. Anixter: I will ask that this be introduced.

Mr. Miller: No objection.

(Letter referred to above admitted into evidence as Plaintiff's Exhibit 3.) [56]

Q. (By Mr. Anixter): Mr. Morrow, the Navy did not agree to pay you that, did they?

A. They never do.

Q. And consequently this not an item that was due you under your contract?

A. Well, that is the type of contract we worked from from the start. All of our jobs went the same way.

Q. Those items were not stated in your contract?

A. No, sir, this is work over and above the contract.

Q. And this is a claim you are making over and above the contract? A. Yes.

Q. And it is not something that was agreed to?

A. That is right.

Q. Now, in all your other contracts you are talking about the situation is the same, is it not?

(Testimony of Marvin Morrow.)

A. Yes.

Q. The United States did not agree to pay you these amounts?

A. That is right. We had to negotiate the extras after the job.

Q. Well, it is something that you wished to negotiate, isn't that right?

A. It is a matter of form. We did it.

Q. You did it, but you wished the Government to pay you that? They did not agree to pay you that? [57]

A. No, sir, I will not say "Yes" to that. We successfully negotiated 80 per cent of our contracts that we worked on, maybe 90 per cent, during the time that we were in business.

Q. For the full amount that you asked for?

A. Over and above the amount of the contract price. If the bid was priced at \$5,000.00, it wasn't unusual for the contract to turn out 15,000, maybe 20,000.

Q. Now, there is a provision in these contracts, is there not, requiring you to get an authorization from the inspector before doing anything extra?

A. No, sir.

Q. In none of your contracts?

A. No, sir. I will answer it this way—

Q. (Interposing) You have already answered. Do you wish to change your answer?

A. Well, I will condition it. Written or verbal contracts?

Q. I am talking about your written contracts.

(Testimony of Marvin Morrow.)

A. On the written contracts, you do not have permission to proceed with anything without authority, but if they give you verbal permission, you proceed.

Q. In other words, you are required to get permission? A. Verbal permission.

Q. Isn't it a fact that the contract requires it to be in writing? A. No, sir. [58]

Q. It is your statement they do not?

A. Well, the contracts do, yes, sir.

Q. Oh, the contracts do provide that you get authorization in writing? You are changing your answer again?

A. It is impossible, sir. At midnight you couldn't get permission.

Q. I am not asking you to argue with me. I am merely asking you what the contract says.

A. Yes, the contract says you must obtain written permission.

Q. That is all I have asked you.

A. Yes, sir.

Q. Now, Mr. Morrow, I will show you the bank statement of Mechanix, Inc., for the month of March, 1953, and if you will look at that——

Mr. Anixter: Pardon me, do you wish to see these?

Mr. Miller: Yes.

Q. (By Mr. Anixter): I will ask you to look at these bank statements, Mr. Morrow, and ask you whether or not it is not a fact that from the 3rd day of March, 1953, onward, there were overdrafts.

(Testimony of Marvin Morrow.)

A. This is March, 1953?

Q. Yes. A. Yes, sir.

Q. And for the entire month, and up until March 11, 1953, there was an overdraft of \$8,864.25, is that correct? [59]

A. That is very possible.

Mr. Anixter: That is all, Mr. Morrow.

Redirect Examination

Q. (By Mr. Miller): Did you have certain contracts pledged to the bank at that time?

A. Oh, yes. All of ours were pledged to the bank and assigned. I guess you would say it was pledged. They were assigned to the bank.

Q. Were those overdrafts had with previous arrangement with the bank?

A. Oh, yes. All our contracts from the United States Government were assigned outright to the bank. They received the money first.

Q. On March 18, 1953, what was the status of the account?

A. 9,000 in the black—\$9,412.00.

Q. On the credit side? A. Yes, sir.

Q. Was it the custom—withdraw that.

Have you been in this business for several years, Mr. Morrow? A. Yes.

Q. And you worked with the inspectors?

A. Yes.

Q. Various branches of the Government?

A. Yes, sir. [60]

Q. Was it the custom of the inspectors to give

(Testimony of Marvin Morrow.)

you oral permission to do work over and above that set forth in the contract? A. Yes.

Mr. Anixter: I will object to that on the ground no proper foundation has been laid. This man was only in business for a year before that time and isn't qualified to know the custom of Government inspectors.

The Court: Well, of course it calls for his opinion and conclusion.

Mr. Miller: Well, it is a matter of business custom.

The Witness: I think the men on the job——

The Court: Well, I will sustain the objection.

Q. (Mr. Miller): Had there been occasions prior to the Union job when your company had done work on oral permission and had been paid by the Governmental agency for that work?

A. Yes.

Mr. Anixter: I submit that is incompetent, irrelevant and immaterial.

The Court: I don't see the competency of that.

Mr. Miller: Well, it is a question of validity.

The Court: Well, he made some other contracts at different times that had a different result. What difference does it make?

Mr. Miller: Well, he had every reason to believe this one [61] would turn out all right.

The Court: It is like saying I made a profit when I sold my 1953 automobile, and my 1952 and my 1951, but ran into some trouble with my 1954. I don't think that that has any materiality.

(Testimony of Marvin Morrow.)

Mr. Miller: I have no further questions of this witness.

Recross Examination

Q. (By Mr. Anixter): Mr. Morrow, at the time you and Mr. Sims took these checks you owed other labor claims, did you not? A. Pardon me?

Q. At the time you drew these checks to Mr. Sims and yourself, there were other wage claimants whose wages had not been paid, were there not?

A. Such as what? I don't know. No, I know of no other claims that were not paid.

Q. There were other creditors' claims, however, that were not paid? A. Yes, creditors.

Q. But is it your contention that the other wage claims were all paid? A. Yes, sir.

Q. As a matter of fact, didn't the Labor Commission come after you for the payment of these?

A. For ours or for whose?

Q. For the others, not for yours. [62]

A. No, sir. The Labor Commissioner came to look into some overtime claims, that is all. Which we disputed, of course. We said it wasn't owed.

Mr. Anixter: That is all.

Redirect Examination

Q. (By Mr. Miller): Your company was current in the payment of wages? A. Yes.

Q. The claims that were filed by the Labor Commissioner in the bankruptcy proceedings were based upon the fact that the bank would not honor the checks after the petition, the involuntary peti-

(Testimony of Marvin Morrow.)

tion in bankruptcy was filed on March 13th, 1953, isn't that right? A. Yes.

Q. And the money then due to the wage earners was simply for that short time period? A. Yes.

The Court: You mean the bank took whatever money you had under your assignment?

Mr. Miller: Yes.

The Court: There was no money in the account to pay the wage claims?

Mr. Miller: Well, I don't know.

The Court: At any rate, there wasn't any money to pay them? [63]

Mr. Miller: They would not honor the checks because of the bankruptcy proceedings. There had been a receiver appointed. The checks were tendered after the appointment of the receiver. Actually, it shows a credit balance in the bank account and there were sufficient funds to pay the checks.

The Court: Anything else of the witness?

Mr. Miller: I have nothing further.

The Court: All right. Witness excused.

DANIEL BARAN

called as a witness on behalf of the Defendants,
sworn:

The Clerk: Please state your name for the Court.

A. Daniel Baran—B-a-r-a-n.

Direct Examination

Q. (By Mr. Miller): Mr. Baran, by whom are you employed at the present time?

(Testimony of Daniel Baran.)

A. C. W. Mardell.

Q. During the year 1953 were you employed by Mechanix, Inc., a corporation? A. I was.

Q. In what capacity?

A. Well, I was the general administrative assistant and helped in all capacities.

Q. When did you enter into the employment of Mechanix, Inc.? A. I beg your pardon?

Q. When did you first start to work for Mechanix? [64] A. In September, 1951.

Q. And you were familiar generally with the kind of work it did?

A. Generally, yes.

Q. What work would that be?

A. With the ship repair work, we worked on the specific repairs of ships, and at the time I went there, they were engaged in a so-called aluminum job for the United States Navy.

Q. During the time that you were there, did you have occasion to work on negotiation of charges for extras on any of the jobs?

A. In some small capacities, yes, sir.

Q. What capacities?

A. Well, in certain instances it might be an accounting for certain installations involved and doing of extras.

Q. Now, you were not an officer of the corporation, were you? A. No, sir.

Q. Nor were you a director?

A. No, sir, I was just an employee.

Q. And now, you were familiar with the job per-

(Testimony of Daniel Baran.)

formed by Mr. Morrow? A. Yes, sir.

Q. Was that as sales manager? A. Yes, sir.

Q. Did you observe whether or not he worked on negotiations of extras? A. Yes, sir.

Q. Were you familiar with this job on the Union? A. Fairly familiar, sir.

Q. Do you know when that job was completed?

A. I don't know exactly. I mean, I can't answer the month. Strange as it may seem, it is a little vague. It was at the end of 1952 or beginning of 1953.

Q. Did you do any work at all in connection with the negotiation of charges for extras on the Union job? A. No, sir.

Q. Would that normally be part of your duties?

A. It would eventually be so far as certain negotiable points that might pertain to my work, it would have eventually come into certain work that I did.

Q. Were you in charge of accounts payable for the company? A. Not directly.

Q. Well, was it one of your responsibilities to arrange for payment of the accounts owed by the company?

A. May I answer the question this way, that I was an administrative assistant. In most cases Mr. Morrow would be called or Mr. Sims, or if necessary, I would answer the questions. Our books were taken care of by someone else. If it was a question of expediting or explaining to a customer why a payment hadn't been made, if the creditor had some

(Testimony of Daniel Baran.)

specific terms, I might or Mr. Morrow or Mr. Sims might talk with the creditor.

Q. What was your salary there?

Mr. Anixter: Incompetent, irrelevant and immaterial. A. \$200.00 a month.

Mr. Anixter: He has no claim.

The Court: Well, let it stand. Go ahead.

The Witness: Shall I answer the question?

The Court: He said \$200.00 a month.

Q. (By Mr. Miller): \$200.00 a month?

A. \$200.00 a week, I beg your pardon.

Q. Had you made any of the arrangements with the bank for banking by the company or loans by the bank to the company? A. No, sir.

Mr. Miller: I have no further questions at this time.

Mr. Anixter: I have none.

The Court: That is all. Witness excused.

Mr. Miller: Call Mr. Sims.

HOWARD SIMS

a defendant herein, called as a witness in his own behalf, sworn:

The Clerk: Please state your name to the Court.

A. Howard Sims.

Mr. Miller: Your Honor, in the interests of time, Mr. [67] Anixter and I can stipulate that Mr. Sims was an officer of the corporation, was the plant superintendent, and was a shareholder; and that his testimony would be substantially that as the testimony of Mr. Morrow with regard to the jobs

(Testimony of Howard Sims.)

and the amounts owing, and so forth.

I don't know, we have the man here if the Court has any questions.

The Court: It is agreeable to me. Is it agreeable to you to stipulate——

Mr. Anixter: Yes.

The Court: ——that the witness would testify substantially as Mr. Morrow in regard to the things he testified to? Is that agreeable to you?

Mr. Miller: Yes.

Mr. Anixter: Yes.

The Court: All right, that is all then. Witness excused.

Mr. Miller: Your Honor, Mr. Anixter and I can stipulate that Mr. Sims and Mr. Morrow drew \$300.00 a week for some period prior to January, 1953. We haven't been all the way back through the record, but we know that between November 30, 1952, and December 7, 1953, both parties drew the full \$300.00 a week.

I realize that this is a correction of the testimony offered by Mr. Morrow, but he just told me he thought he was mistaken and asked me to check the records, which we did. We [68] find that they did in fact receive the full amount of \$300.00 a week.

The Court: This \$150.00 was from January——

Mr. Miller: No, the \$150.00 was to make up the \$300.00. In other words, they had not——

The Court: Oh, they had actually drawn for some period in 1952 \$300.00 a week apiece. From

January on they had only drawn \$150.00 a week?

Mr. Miller: That is correct, your Honor. That is what the record shows.

The Court: Is that according to the record?

Mr. Anixter: Then do I understand, Mr. Miller, that for this entire period between January and March they did draw the \$150.00, and that this check represented the balance that was due on salary?

Mr. Miller: That is my understanding, your Honor.

Mr. Anixter: Then in that case they already got part of the so-called priority wage that they would be entitled to, your Honor.

Mr. Miller: Well, that is another question of law, whether the priority would apply to wages owing or earned.

The Court: What is the limitation?

Mr. Anixter: \$600.00 if earned within three months immediately preceding the filing of the petition. So they would have each received more than \$300.00—— [69]

The Court: They would have received more than \$600.00 apiece.

Mr. Miller: That's if they had received that much, there is no question, your Honor.

The Court: Then there wouldn't be any priority question.

Mr. Anixter: That is correct.

Mr. Miller: But the question is: Would the priority apply to amounts received or amounts

owing—I should say amounts earned or amounts owing.

Mr. Anixter: They are only entitled to a priority of \$600.00.

The Court: Well, they were claiming at the time of the bankruptcy that they had \$1500.00 due, that the salary was \$1500.00 for the previous two months, and if he received \$750.00 of it, his priority is only to the extent of \$600.00, isn't it?

Mr. Anixter: That is correct.

Mr. Miller: Would he be entitled to receive the \$600.00?

Mr. Anixter: He has already received that \$600.00.

Mr. Miller: Or would it be said that he has already received it? That's the question. Frankly, I haven't checked the cases, your Honor.

The Court: I don't know. The *prior* extend to the amount that is not paid, doesn't it?

Mr. Anixter: Well, the priority is just unpaid wages. [70]

The Court: You wouldn't have the question of priority unless you have unpaid wages. You have to start out with that assumption. As to any amount not paid, there would be a priority of \$600.00, wouldn't there, if it was wages?

Mr. Anixter: If it was wages earned within that time, but apparently he had been paid at least half of the total amount earned within that time.

The Court: That is of the total amount, but doesn't the time—the only time the question of

priority arises is with respect to wages that are unpaid.

Mr. Anixter: That is correct, but they must have been earned within three months prior to the filing of the petition in bankruptcy—

Mr. Miller: These were earned during that period.

Mr. Anixter: —and only half of these would have been earned within that period. The other half would have gone on as a balance due before that time.

Mr. Miller: No, they had been paid the full \$300.00 up to January of 1953.

Mr. Anixter: That is correct.

Mr. Miller: So the full amount was earned during the 90-day period.

Mr. Anixter: Oh, I see what you mean.

The Court: You had \$1200.00 a month, roughly speaking. Let's take two months, \$2400.00 that was due. \$1200.00 of that [71] had been paid. Let's take a two-month period. That \$1200.00 was owing them at the date of bankruptcy.

Mr. Anixter: That is correct.

The Court: Doesn't the priority extend—

Mr. Anixter: It apparently was earned within that time, so if they are entitled to a priority, this wouldn't change anything.

The Court: You couldn't have the question of priority unless you had some unpaid wages, so the only question is whether or not this \$600.00, or the amount due each of them, was in the form of wages

that is subject to application of the priority rule.

Did anybody have any more testimony?

Mr. Miller: No.

Mr. Anixter: I wanted to put some testimony in as to the value of these claims.

The Court: All right.

PETER HUNT

called as a witness on behalf of the plaintiff; sworn:

The Clerk: Please state your name to the Court.

A. Peter Hunt.

Direct Examination

Q. (By Mr. Anixter): Mr. Hunt, you are an attorney?

A. Yes.

Q. And you are associated with the firm of Shapro and [72] Rothschild?

A. That is correct.

Q. And prior to your association with the firm of Shapro and Rothschild with whom were you associated?

A. I was associated with the firm of Thelen, Marrin, Johnson and Bridges in San Francisco.

Q. And what type of work were you doing with them?

A. I specialized largely in Government contract law there.

Q. Now, Mr. Hunt, Shapro and Rothschild are the attorneys for the trustee in the matter of Mechanix, Inc., a corporation, in bankruptcy, are they not?

A. They are.

(Testimony of Peter Hunt.)

Q. And as a member of that firm you have been working on this case? A. Yes, sir.

Q. What phase of the case have you been working on?

A. I have been working on the phase that relates to the prosecution of the claims or supposed claims against the United States Navy.

Q. You have made a complete investigation of this matter?

A. I have made a study of all the outstanding claims, yes.

Q. And are there any of these claims in which the Government has agreed to make any payments?

A. There is one claim in which the Government has agreed to make a payment. The matter is presently before the United [73] States Department of Labor for the liquidation of the amount to be paid. That liquidation will be between three and five thousand dollars. No more than \$5,000.00 can be paid in that matter.

Q. Now, with the exception of that claim, is there any other claim that the Government has agreed to pay?

A. No, all the others are still in the process of negotiation and are disputed by the Government.

Q. They are all disputed by the Government?

A. They are.

Q. Now, I particularly call your attention to the claim of the Union. That is the largest claim, is it not? A. That is right.

Q. Is that claim disputed by the Government?

(Testimony of Peter Hunt.)

A. That is quite right. That is likewise disputed by the Government.

Q. As a matter of fact, have they denied liability?

A. No, they haven't altogether. On one small aspect of that case, the money amount of which will be in the neighborhood of \$8,000.00——

Q. (Interposing) What was the suit and what was that sum? A. Not in excess of \$8,000.00.

Q. Not in excess of \$8,000.00.

A. They have not denied liability. On the other hand, they have not admitted liability. It is still in the process of [74] negotiation as to that one small matter.

Q. As to that one small matter. With the exception of that one small matter, have you formed any opinion as to the value of that claim?

A. I think when you take into consideration all of the legal factors and the factual factors, the trustee in bankruptcy will realize from the Government fifteen or sixteen thousand dollars on account of the Union.

Q. And that is in addition to this other sum that you have mentioned?

A. That is in addition to this other sum, which will not be in excess of \$5,000.00.

Q. And what, in your opinion, would be the outside entire recovery on the claims being processed?

A. On all the several claims, my opinion on the outside value of all the claims being processed by

(Testimony of Peter Hunt.)

me now against the United States Government is \$23,000.00 to \$23,500.00.

Q. And you have taken whatever proceedings were necessary for the collection of these claims?

A. Yes. I have not sued in the Court of Claims, however, because I have felt that in many matters where liability was denied by the Government, it would be worthless to file an action in the Court of Claims. I have taken all the administrative steps necessary to realize from the Government.

Mr. Anixter: That is all. [75]

Cross Examination

Q. (By Mr. Miller): Mr. Hunt, how long were you with Thelen's office?

A. I was with them approximately two years.

Q. That was after passing the bar?

A. Before and after.

Q. Did you do any ship repair renegotiation of work there? A. No, I didn't.

Q. Actually, this is your first case of ship renegotiation? A. Yes, it is.

Q. You say you have not filed suit in the Court of Claims? A. No.

Q. And you don't expect to?

A. I don't intend to file suit.

Q. Now, you say that they have not denied liability as to the \$8,000 on the Union job, but haven't admitted it. What is the attitude of the Government towards that?

(Testimony of Peter Hunt.)

A. I would say on that particular matter, that their attitude is favorable.

Q. Do you have written consent from any inspectors for any of the extras that were performed on the Union job?

A. I can't find them in the file of Mechanix, Inc.

Q. Do you have or did you have consent for any of the extras that were performed and for which the Government paid as you stated here a moment ago? [76]

A. No. However, that was not a matter which related to extras. That was a matter of a setoff against an admitted Government liability.

Q. Admitted Government liability for what?

A. For amounts due under an Air Force contract.

Q. And what was the setoff?

A. The setoff was the overtime wage payments under the Walt-Seeley (sic) Act, and that setoff is the one which is being presently liquidated before the United States Department of Labor.

Q. You mean the Government had a claim against the corporation and set it off against an Air Force contract? A. Precisely.

Q. And you feel that despite the fact that there are no consents to perform extra work, the Government will accept the liability for at least part of it?

A. I think they will, yes.

Q. Why would the Government not accept responsibility for the rest of it in your opinion?

(Testimony of Peter Hunt.)

A. Because the basis of liability is different in many cases. The acceptance by the Government of liability in one case legally is a matter of accommodation. In my opinion they have no legal obligation to accept it without the written consent, and the Court of Claims has so held in some cases.

However, as a matter of accommodation, where there has [77] been undue hardship, as a matter of administrative determination, they will allow an extra without the written consent.

Q. Has the Court of Claims denied recovery to claimants in all cases where there has not been written consent firsthand?

A. There have been cases where both the Court of Claims and the United States Supreme Court have allowed it.

Q. I assume those were instances where there had been previous payment made where an extra work was performed without written consent and the claimant acted in reliance on that previous payment, is that correct?

A. I don't know about that. Estoppel arose where there was considerable detriment to the contractor, after having been promised by the chief contracting officer of a "to-be" executed written authorization.

Q. Have you determined whether or not such is the case in this instance?

A. Based upon my investigation of the facts, I conclude that the facts here don't fit into that case.

Q. Don't you feel a direction of promissory

(Testimony of Peter Hunt.)

estoppel should apply in a case wherein there had been previous payments under a similar set of circumstances and the work was done in reliance on those previous payments?

A. That is an arguable proposition. The great weight of cases is that, notwithstanding the seriousness of payments, any particular payment has to stand on its own feet and you [78] cannot rely on, in other words, what is more specifically to be termed estoppel in pay.

Q. In any event, it is your opinion this is not one of the cases which should be taken up to the Supreme Court to see whether the principle should apply? A. I don't think so.

Q. Have you done the renegotiating with the Government since you came into this case?

A. Yes, by letter and by telephone.

Q. When did you first come into the matter, Mr. Hunt?

A. Just about a year ago, I would say, April or May, possibly March, 1954.

Q. Had anybody worked on it prior to that time? A. Yes, sir.

Q. Who was that?

A. Another attorney in the office. His name is Daniel Cowans.

Q. Did you have any contact with anyone in the office of Harold Faulkner in connection with this matter? A. I personally have not.

Q. Is there anything in the files to indicate that

(Testimony of Peter Hunt.)

Faulkner's office had handled this matter or had worked on it at all?

A. Not in the files I have here. I have a recollection, however, in a file I did not bring with me, there is reference to Harold Faulkner's office. [79]

Q. You yourself have not contacted Faulkner's office about the matter? A. No.

Mr. Miller: No further questions.

The Court: That is all. Witness excused.

Mr. Anixter: The Trustee will rest.

Mr. Miller: We rest, your Honor.

The Court: That concludes the evidence?

Mr. Miller: Yes, your Honor.

The Court: This case doesn't amount to very much when you eliminate the possible priority claims.

Mr. Anixter: There isn't a great deal involved. As far as that priority point is concerned, there is a great deal of authority on there that an officer and director is not entitled to the priority as a labor claim, notwithstanding the fact that he actually put in his time. He is considered as an executive. As this point was not made by Mr. Miller before this morning, I didn't come prepared.

The Court: Well, let me ask you this question: There is no claim made by the Trustee that there was any unauthorized withdrawals or taking away of assets besides this amount involved in this?

Mr. Anixter: No, we are not making any such claim.

The Court: These fellows got into this business

and they weren't sufficiently financed and it cost a lot more than they [80] anticipated, and they bit off possibly more than they could chew, and they really were not equipped financially to handle contracts of this nature, isn't that right?

Mr. Anixter: Yes. In the Bankruptcy Court we did go into the question of a likelihood of unusually large expenditures for entertainment and liquor, but knowing the nature of the business, we didn't see any point in actually going after that because those things are always so hard to prove.

The Court: Well, there wasn't anything particularly equitable about these men getting compensation for their work, even though the creditors got hurt.

Mr. Anixter: Well, they actually did work; there isn't any question about that.

The Court: I don't think there is too much to this case. I can't arouse myself to any great excitement over it.

I would be inclined to say that probably they lost everything they had and the few dollars concerned so far as services were concerned is not of any great moment to the creditors. Unless there was some overbearing reason for it, I certainly—They are entitled to get some money for their services.

They ran up against a situation you probably are familiar with in the bankruptcy court, and which we see frequently in court, that you have to be specially equipped to handle Government contracts. Unless you have the money and the resources and know how to handle it, the Governmental require-

covery, but with knowledge they were insolvent and with intent to actually prefer themselves.

Mr. Miller: If your Honor can satisfy himself that these men or the corporation would have paid Sims and Morrow to go ahead, regardless of any action that might have been contemplated by the creditors, then the Court can find that there was not intent as preferential payment.

If, on the other hand, the only reason these men paid themselves at this time was because they knew a petition was going to be filed, then I would agree with Mr. Anixter and the Court's conclusion that it was an act of preference and was intended only as a preference.

But it is our position the corporation would have paid this money because it owed the money. It had been authorized previously.

The Court: Well, the case depends upon the inferences. There is no primary evidence.

Mr. Anixter: With one exception, that they ran this company. I don't see how anyone could say they were not chargeable.

The Court: That is the very question you want to have decided. There is no evidence who the stockholders were. [84] Was there anybody else besides these two men?

Mr. Miller: I don't believe so.

Mr. Anixter: Yes, there were other stockholders. I believe the corporation bought back some of the capital stock——

The Court (Interposing): Irrespective of that, were there any substantial stockholders besides

these two men at the time of the bankruptcy?

Mr. Miller: I am sure not. They say no. If this were a voluntary petition drawn the same day or the day after the checks were drawn——

Mr. Anixter: It is very close to it. There was a meeting at the Board of Trade.

Mr. Miller: That is true. These men were not invited to it. There is no question there was money owing. There was a shortage of working capital. That is a far cry from insolvency.

I don't want to labor the point. I think we have both covered the matter.

The Court: Well, I will think it over for a day or two. I don't think too much of the case, Mr. Anixter. Most cases of preference are where a creditor comes in and gets the pay in preference against other creditors.

I don't think there is any legal question involved. It is a pure question of fact. I have made some notes and I would like to think it over. [85]

I will mark it submitted.

(Whereupon these proceedings were adjourned and the matter submitted.) [85A]

[Endorsed]: Filed September 7, 1956.

[Endorsed]: No. 15299. United States Court of Appeals for the Ninth Circuit. Walter J. Hempy, as Trustee of the Estate of Mechanix, Inc., a corporation, bankrupt, Appellant, vs. John Howard Sims and Marvin D. Morrow, Appellees. Transcript

of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: September 10, 1956.

Docketed: September 26, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15299

WALTER J. HEMPY, as Trustee of the Estate
of MECHANIX, INC., a corporation,
Bankrupt, Appellant,
vs.

JOHN HOWARD SIMS and MARVIN D.
MORROW, Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT RELIES

1. Error of the District Court in making underlined portion of the following Finding of Fact, viz:

"2) That within four months prior to the filing of the petition in bankruptcy against Mechanix, Inc., a corporation, paid to each defendant herein the sum of \$1,500.00 which said payment was compensation to each of the said defendants for labor

and services rendered to the said Mechanix, Inc., and that at the said time the said defendants each promised to continue in the employment of Mechanix, Inc.;"

Instead of the underlined portion above set forth the Finding should have ended without the inclusion of said portion.

2. Error of the District Court in making the following Finding of Fact which the evidence before the Court did not support:

"4) That at the time the said defendants received the said payments the defendants did not know, nor did the said defendants have reasonable cause to believe that the said Mechanix, Inc., was insolvent;"

Instead of such Finding, the District Court should have found that under the evidence defendants had reasonable cause to know that said Mechanix, Inc. was insolvent at the time said payments to them were made.

3. Error of the District Court in making the following conclusion of law which the evidence and facts do not support:

"1) That the payments by Mechanix, Inc., the bankrupt herein, of the sum of \$1,500.00 to each of the said defendants, which said payment was made prior to the filing of the petition of bankruptcy against the said Mechanix, Inc., was not a preferential payment by the said Mechanix, Inc.,

to the said defendants made within four months prior to the filing of bankruptcy and that the said trustee in bankruptcy is not entitled to recover from defendants the sum of \$1,500.00 from each of the said defendants.”

Instead of said conclusion the District Court should have entered its conclusion of law that the plaintiff sustained the burden of proving that defendants had reasonable cause to believe that Mechanix, Inc., was insolvent at the time of making the said payments of \$1,500.00 to each of them, and that said defendants and each of them, are indebted to plaintiff in the sum of \$1,500.00.

4. Error of District Court in entering judgment for defendants. Instead thereof, the District Court should have entered judgment for the plaintiff against each of said defendants in the amount of \$1,500.00, plus legal interest, and for plaintiff's costs and disbursements incurred.

Dated: This 21st day of September, 1956.

SHAPRO & ROTHCHILD and
JAMES M. CONNERS,

/s/ RAYMOND T. ANIXTER,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 24, 1956. Paul P. O'Brien, Clerk.

No. 15,299

United States Court of Appeals
For the Ninth Circuit

WALTER J. HEMPY, as Trustee of the Estate of
Mechanix, Inc., a corporation, bankrupt,
vs. *Appellant,*

JOHN HOWARD SIMS and MARVIN D. MORROW,
Appellees.

APPELLANT'S OPENING BRIEF.

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FILED

DEC 26 1956



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No. 15,299

**United States Court of Appeals
For the Ninth Circuit**

WALTER J. HEMPY, as Trustee of the Estate of
Mechanix, Inc., a corporation, bankrupt,

Appellant,

vs.

JOHN HOWARD SIMS and MARVIN D. MORROW,

Appellees.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant filed a complaint in the District Court (T.R. p. 4) to recover a preference from Appellees pursuant to the provisions of section 60(b), 11 U.S.C.A. 96(b) of the Bankruptcy Act. The District Court rendered its judgment in favor of Appellees. Pursuant to the provisions of 11 U.S.C.A. 47, Appellant filed his notice of appeal on July 5, 1956 (T.R. p. 13). The appeal was timely filed (11 U.S.C.A. 48).

STATEMENT OF THE QUESTION PRESENTED.

The question before the Court is whether or not the payment of past due salaries to the Appellees, presi-

dent and secretary of a corporation, who were also directors, principal shareholders and the managing officers, within two weeks prior to the filing of a petition in bankruptcy against it constituted a preferential payment. In determining this question two issues must be considered.

(a) Was the corporation insolvent?

(b) Did Appellees have reasonable cause to believe the corporation was insolvent at the time the payment was made?

STATEMENT OF FACTS.

On March 13, 1953 an involuntary petition in bankruptcy was filed against Mechanix, Inc., a corporation, in the United States Court for the Northern District of California in proceeding numbered therein 41488. Subsequently, Mechanix, Inc. was adjudicated a bankrupt. On the 8th day of March, 1953 checks in the sum of \$1500.00 each were drawn to the order of John Howard Sims and Marvin D. Morrow, the Appellees, for balances of salary from January 4, 1953 to March 8, 1953 (T.R. p. 25). It was stipulated that at the time these payments were made Appellee, Morrow, was president and Appellee, Sims, secretary of the corporation; that both were directors and shareholders in the corporation; that Appellee, Morrow, was sales manager and Appellee, Sims, plant superintendent, and that between the two of them they operated this business (T.R. p. 18).

ARGUMENT.

- I. THE DISTRICT COURT ERRED IN FINDING THAT APPELLEES PROMISED TO CONTINUE IN THE EMPLOYMENT OF MECHANIX, INC., AT THE TIME THEY WERE PAID THIS BACK SALARY.

The District Court made the following findings of fact (T.R. p. 8):

“(2) That within four months prior to the filing of the petition in bankruptcy against Mechanix, Inc., a corporation, paid to each defendant herein the sum of \$1,500.00 which said payment was compensation to each of the said defendants for labor and services rendered to the said Mechanix, Inc., and *that at the said time the said defendants each promised to continue in the employment of Mechanix, Inc.*”; (Italics ours.)

A preference under the Bankruptcy Act takes place when a creditor receives property of a debtor for or on account of an antecedent indebtedness. Section 60 of the Bankruptcy Act, 11 U.S.C.A. 96 so defines it.

“Section 60. Preferred Creditors. a. (1) A preference is a transfer, as defined in this Act, for any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.”

In the trial below Appellees endeavored to introduce testimony that Appellees agreed to keep working for

bankrupt to show a present consideration for the payment of the balance of past due salary to them. The Court after objection by Appellee refused to admit such testimony (T.R. pp. 60-62 incl.).

“Q. (By Mr. Miller.) Mr. Morrow, was it your intention at the time you received this payment on March 8, 1953, to continue in the employ of Mechanix, Inc.?”

A. Yes, sir.

(Testimony of Marvin Morrow.)

Mr. Anixter. That is incompetent, irrelevant and immaterial.

A. Yes, sir.

Mr. Miller. I think it is important, your Honor. It could be consideration for the payment as a fact for the Court to consider.

The Court. I would assume that would be the case. Ask another question.

The Witness. I didn't finish my answer.

The Court. Well, I think we have heard enough. I will take it for granted that, whether it is material or not, you were going to continue on in business if you could.

Mr. Miller. Did you want to ask a question, or did you tell me to?

The Court. I will answer it for him.

The Witness. I want to go a little further.

The Court. Well, you weren't going to leave the business, were you?

A. Yes, I was going to leave the company.

The Court. You were?

A. Yes, sir.

The Court. Then I was wrong.

The Witness. I wanted to explain to the Court why.

The Court. Well, what is the materiality of that? Why did you want to bring that out?

Mr. Miller. I think that would be a question of consideration for the payment, your Honor. That's the point I had in mind.

(Testimony of Marvin Morrow.)

The Court. I think there was already perfectly valid consideration for the payment.

Mr. Miller. No, I say as a matter of law, insofar as this proceeding is concerned, a present consideration should take it out of the preference class.

The Court. How could that be when he has already testified it was back payment that was owing from January, \$150.00 as a salary.

Mr. Miller. The point is, he received the payment in order to keep him on the job, which would make it a present consideration.

The Court. I don't think I would go into that. I don't see any merit in that. I don't think a man has to say he is going to stay on the job to get some money that is already owing him.

The Witness. I could explain that.

The Court. You don't need to. I don't think it is necessary. It is only a legal question. If money is owing to you, it is owing to you. A man doesn't have to stand on his head to get something that is already owing him.

Mr. Miller. I have no further questions of this witness."

Yet, notwithstanding Court's refusal to receive any evidence on this subject, a finding is made by the Court on this very point. The finding is not supported by any evidence, and hence, any inference that there

was a present consideration for the payment to Appellees is completely without foundation. In addition to this it is submitted that if the Court had permitted testimony on this subject, Appellant would have had the right to cross-examine and also to rebut any such testimony. However, the Court dismissed the entire subject matter as unworthy of consideration. Therefore, any finding on the subject not only lacks supporting evidence but is surprising to say the least.

II. THE DISTRICT COURT ERRED IN FINDING THAT APPELLEES DID NOT KNOW NOR HAVE REASONABLE CAUSE TO BELIEVE THAT MECHANIX, INC., WAS INSOLVENT AND IN CONCLUDING THEREUPON THAT THE PAYMENT BY MECHANIX, INC., OF \$1500.00 EACH TO APPELLEES WITHIN FOUR MONTHS FOR BALANCE OF PAST DUE SALARY WAS NOT A PREFERENTIAL PAYMENT BY SAID MECHANIX, INC.

The Court made the following findings of fact (T.R. p. 8):

“(4) That at the time the said defendants received the said payments the defendants did not know, nor did the said defendants have reasonable cause to believe that the said Mechanix, Inc., was insolvent”;

and concluded therefrom (T.R. p. 9):

“(1) That the payment by Mechanix, Inc., the bankrupt herein, of the sum of \$1,500.00 to each of the said defendants, which said payment was made prior to the filing of the petition of bankruptcy against the said Mechanix, Inc., was not a preferential payment by the said Mechanix, Inc., to the said defendants made within four

months prior to the filing of bankruptcy and that the said trustee in bankruptcy is not entitled to recover from the defendants the sum of \$1,500.00 from each of the said defendants.”

This finding and conclusion raise the really important questions in this appeal. Appellant contends that, as a matter of law, the finding is erroneous, and hence, the conclusion must fall. The argument will be divided into two parts.

(1) The bankrupt was insolvent at the time Appellees received payment on past due indebtedness.

The *undisputed* facts show that the payments were made to Appellees on March 8, 1953 and that the involuntary petition in bankruptcy upon which Mechanix, Inc. was adjudicated a bankrupt was filed on March 13, 1953. Appellant's witness, Samuel Mendelson, Certified Public Accountant, prepared a balance sheet of the bankrupt “(Plaintiff's Exhibit 1)” which reflected its condition at the time the payments were made. It had a capital deficit of \$33,955.75. After taking into consideration certain items that might constitute credits, there was still a capital deficit. Appellees endeavored to overcome their own records by showing that, although their books set up accounts receivable of \$150,560.06, (Plaintiff's No. 1) their bankruptcy schedules listed them at \$203,720.21. The difference was based on claims for extras on completed jobs for the United States Government. However, Appellees were unable to substantiate their right to extras on the basis of any agreements with the United States Government. They

admitted that to be able to claim extras a written authorization would be required which they did not have (T.R. p. 69). Consequently, they had no definite agreement upon which a claim could be based.

The testimony of Peter Hunt, the attorney assigned by trustee in bankruptcy to evaluate and process various claims of the bankrupt against the Government, was that the greatest recovery that could be received on these claims would be between \$23,000.00 and \$23,500.00 (T.R. p. 84). These claims are far below the amount that would have rendered the bankrupt solvent. Thus, it appears definite and certain that the bankrupt was insolvent on March 8, 1953 when payments to Appellees were made. The adjudication by the Court of bankruptcy on a petition filed just *five days later* would certainly support this conclusion.

(2) Appellees did have reasonable cause to believe the bankrupt to be insolvent when the payments were received.

The trustee in bankruptcy may avoid a preference if the creditor had reasonable cause to believe that the debtor is insolvent.

Section 60(b), 11 U.S.C.A. 96(b), of the Bankruptcy Act provides as follows:

“b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.”

Some Courts have confused the words used in the above quoted portion of 60(b) “reasonable cause to

believe that debtor is insolvent" with the words "actual knowledge". The Act only provides that the creditor have reasonable cause to believe the debtor to be insolvent. To quote from one of the outstanding texts on bankruptcy:

"Knowledge of insolvency is not necessary, nor even actual belief thereof; all that is required is a reasonable cause to believe that the debtor was insolvent at the time of the preferential transfer. *A creditor has reasonable cause to believe that a debtor is insolvent when such a state of facts is brought to the creditor's notice respecting the affairs and pecuniary condition of a debtor, as would lead a prudent business person to the conclusion that the debtor is insolvent.*" (Italics ours.)

Collier on Bankruptcy, 14th Ed. Vol. 3, p. 989, sec. 60.53.

Thus, if the facts are sufficient to put a prudent business person on notice, he is chargeable with notice of all the facts which reasonably diligent inquiry would leave disclosed.

Collier on Bankruptcy, 14th Ed. Vol. 3, page 989, sec. 60.53.

The Appellees were the president and secretary of the corporation as well as principal shareholders, directors and operating managers. They were in far better position than any other creditor to know the financial condition of the corporation. They knew the corporation did not have enough cash for their operations (T.R. p. 55; pp. 59-60). They were endeavoring to raise capital to continue. They didn't have

enough cash to pay their back salaries in full, and when they finally decided to take them on March 8, 1953, there was an overdraft at the bank. They owed other creditors at the same time but made no payments to them. There were meetings at the Board of Trade (T.R. p. 93). Yet, these Appellees, the managing operators, officers, directors and main shareholders claim to know nothing about the company's solvency? Who would, if they didn't? They are *presumed* to have this knowledge.

Matter of W. A. Silvernail Co., 218 Fed. 978,
33 Am. Br. 59;

Irving Trust Co. v. Roth, D.C., N.Y., 48 F. 2d
345;

Cohen v. Tremont Trust Co., (D.C., Mass.) 256
Fed. 399, aff'd 263 F. 81;

New York Credit Men's Ass'n. v. Hasenberg,
(D.C., N.Y.), 26 F. Supp. 877 aff'd 107 F.
2d 1020;

In re Plant, 148 Fed. 37.

The chief officers of a corporation are charged with knowledge of the corporation activities. Appellee, Morrow, admitted that monthly statements were prepared by the corporation and that the operating statement for February, 1953 (Plaintiff's Exhibit 2), the month just prior to the filing of the petition in bankruptcy, showed a net deficit for the month of \$9663.12 (T.R. p. 64). Yet, Appellees claim they did not know what their records would disclose.

If the managing officers and directors are not chargeable with knowledge of the conditions of their

company, how could anyone ever be held to any knowledge of a corporation's affairs? As a matter of fact, Appellant is satisfied that even the Court below felt that the Appellees had reasonable cause to believe they were insolvent but mistakenly didn't feel that this was a proper type of preference case (T.R. p. 91).

"The Court. I am satisfied they must have felt conditions were getting tight, and they took the money, whether it amounted to a legal status recovery, but with knowledge they were insolvent and with interest to actually prefer themselves." (T.R. p. 91.)

The Court also seemed to feel that this case was not like the usual preference case.

"The Court. Well I will think it over for a day or two. I don't think much of the case Mr. Anixter; most cases of preference are where a creditor comes in and gets the pay in preference against other creditors." (T.R. p. 93.)

It seems rather strange that the Court feels that officers and directors of a corporation on whom creditors have to rely in their business dealings are entitled to take advantage of their position and knowledge and fill their own pockets at the creditors' expense. It is also hard to understand how a Court can make a finding that Appellees did not have reasonable cause to believe the bankrupt to be insolvent in view of the Court's statement and the undisputed evidence quoted above.

For the foregoing reasons the trustee contends that the findings of the trial Court (T.R. pp. 7-9) are

not only unsupported by the evidence adduced but are also inconsistent with the Court's own "oral findings" as quoted above. Apparently, the trial Court labored under the misapprehension that because Appellees, although with reasonable cause to believe the bankrupt's insolvency received the payments in question under conditions which would be preferential to a creditor who was an officer employed by the bankrupt corporation, such payments were not recoverable by the trustee under section 60(b) of the Bankruptcy Act. We feel that the purpose of the preference law is to prevent a depletion of the insolvent debtor's estate by transfers to any creditors who have either knowledge of or reasonable cause to believe in the debtor's insolvency at the time of receipt of such payments. We believe that such recoveries should be had, regardless of the amount involved, and that *to condone the trial Court's judgment in this case would be to encourage, rather than discourage, corporate officers, with knowledge of a failing business, to withdraw as much of the corporation's cash prior to bankruptcy as their back salaries or other personal claims as creditors could possibly permit.* This is not consistent with the rights of creditors generally which the Bankruptcy Act is designed to protect. For these reasons we believe the trustee in bankruptcy must bring actions such as this even though the amounts involved may individually be small, because when added together, they would substantially increase the fund to which general creditors could look for recovery on their claims.

CONCLUSION.

Therefore, it is respectfully submitted that the judgment of the District Court should be reversed because the payments made by the managing officers to themselves on account of back salaries at a time when the corporation was insolvent were made with the presumptive knowledge as well as reasonable cause to believe the corporation was insolvent and were preferential within the meaning of section 60(b) of the Bankruptcy Act.

Dated, San Francisco, California,
December 21, 1956.

SHAPRO & ROTHSCHILD and
JAMES M. CONNCERS,
By RAYMOND T. ANIXTER,
Attorneys for Appellant.

RAYMOND T. ANIXTER,
Of Counsel.

No. 15,299
United States Court of Appeals
For the Ninth Circuit

WALTER J. HEMPY, as Trustee of the Estate of
Mechanix, Inc., a corporation, bankrupt,

Appellant,

vs.

JOHN HOWARD SIMS and MARVIN D. MORROW,

Appellees.

APPELLEES' REPLY BRIEF.

ALFRED M. MILLER,

986 Mills Building, San Francisco 4, California,

Attorney for Appellees.

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PAUL P. O'BRIEN

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No. 15,299

United States Court of Appeals For the Ninth Circuit

WALTER J. HEMPY, as Trustee of the Estate of Mechanix, Inc., a corporation, bankrupt, vs. JOHN HOWARD SIMS and MARVIN D. MORROW,	}	<i>Appellant,</i> <i>Appellees.</i>
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APPELLEES' REPLY BRIEF.

STATEMENT OF JURISDICTION.

Appellant herein filed a complaint in the District Court (Tr. p. 4) to recover a preference from appellees pursuant to the provisions of section 60(b), 11 U.S.C.A. 96(b) of the Bankruptcy Act. The District Court rendered its judgment in favor of appellees. Pursuant to the provisions of 11 U.S.C.A. 47, appellant filed his notice of appeal on July 5, 1956. (Tr. p. 13.) The appeal was timely filed. (11 U.S.C.A. 48.)

STATEMENT OF THE QUESTION PRESENTED.

In addition to questions presented by appellant in its opening brief, this Court shall be called upon to

determine whether or not appellees gave appellant's predecessor, the bankrupt corporation, a present consideration for the payment of past due salaries to the appellees.

STATEMENT OF FACTS.

In addition to the facts set forth in appellant's statement of facts certain other facts are essential to the consideration of the questions presented on this appeal.

On the eighth day of March, 1953, Mechanix, Inc., a corporation which employed the appellees, made payment to the appellees of salaries which were due for the period from January 4, 1953 to March 8, 1953. (Tr. p. 25.) At that time the soon to be adjudicated bankrupt had received a substantial payment from one of its debtors and the money received from the said debtor enabled the bankrupt to pay the salaries which were then due. It was the intention of the appellees who were the sales manager and plant superintendent of Mechanix, Inc., to leave the employ of Mechanix, Inc., unless the salaries that were due to them were paid. (Tr. pp. 60-61.) On March 8, 1953 Mechanix, Inc., a corporation had claims pending against various agencies of the United States government for sums in excess of \$150,000.00 for services rendered in repairing ships belonging to the various agencies of the United States government. (Tr. pp. 27, 52.)

ARGUMENT.

1. **THE DISTRICT COURT DID NOT COMMIT ERROR IN FINDING THAT APPELLEES PROMISED TO CONTINUE IN THE EMPLOYMENT OF MECHANIX, INC., AT THE TIME THEY WERE PAID THE BACK SALARY.**

The District Court made the finding of fact headed number two (Tr. p. 8) as set forth in appellant's opening brief. The only question that the appellate Court has to consider is whether or not there is sufficient evidence in the record to sustain the finding of fact made by the trier of the facts. It is not the duty nor the province of the Circuit Court to review the evidence and determine whether or not the Circuit Court would have decided the case differently if it were to try the facts.

The Appellate Court cannot upset the findings of fact made by the trier of the facts where the evidence is conflicting and where different inferences might be drawn.

Roche v. New Hampshire Nat. Bank, 192 F.2d 203.

It has been held that findings of fact cannot be set aside unless findings are clearly erroneous.

Norberg v. Ryan, C.A. 9th 1951, 193 F.2d 407.

See also:

28 U.S.C.A. Rule 52(a) Federal Rules of Civil Procedure.

The record clearly shows that at least one of the considerations for the payment of the salaries admittedly due to appellees was the promise of appellees

to remain in the employ of the appellant's predecessor (Tr. pp. 60, 61), and therefore it cannot be said that there is no evidence that appellees did not tender a present consideration to appellant or its predecessor for the payment made by the corporation to appellees.

2. **THE DISTRICT COURT DID NOT COMMIT ERROR IN FINDING THAT APPELLEES DID NOT KNOW NOR HAVE REASONABLE CAUSE TO BELIEVE THAT MECHANIX, INC., WAS INSOLVENT AND IN CONCLUDING THEREUPON THAT THE PAYMENT BY MECHANIX, INC., OF \$1,500.00 EACH TO APPELLEES WITHIN FOUR MONTHS FOR BALANCE OF PAST DUE SALARY WAS NOT A PREFERENTIAL PAYMENT BY SAID MECHANIX, INC.**

The Court made the following findings of fact (Tr. p. 8): “(4) That at the time the said defendants received the said payments the defendants did not know, nor did the said defendants have reasonable cause to believe that the said Mechanix, Inc., was insolvent”, and the Court drew a conclusion therefrom that the said payment to the appellees by Mechanix, Inc., was not a preferential payment.

The Appellate Court does not have the power to review the evidence and make findings of fact contrary to those found by the trier of the fact where there is a conflict in the evidence. So long as there is sufficient evidence in the record to sustain the findings of fact by the trial Court or by the jury as the case may be, the Appellate Court is bound by the finding so made.

See:

Roche v. New Hampshire Nat. Bank, supra;
Norberg v. Ryan, supra;

28 U.S.C.A. Rule 52(a) Federal Rules of Civil
Procedure.

There is ample evidence in the transcript to show that the bankrupt was not insolvent at the time appellees herein received the payment made for salaries previously earned by appellees. (Tr. pp. 26, 27, 51.)

Furthermore, the record discloses that the Court was justified by the evidence in finding that the appellees did not have reasonable cause to believe the bankrupt to be insolvent at the time the appellees received the salaries which were paid to them.

Insolvency has been defined to mean that the fair value of the assets of a business do not exceed the liabilities thereof. The evidence introduced in this case shows that the appellees had reasonable cause to believe that the assets of this corporation did in fact exceed the liabilities. The testimony showed that the corporation throughout all of its business activities had to rely upon payments from its various debtors for extras performed by the corporation on contracts which the corporation had with its various debtors, principally the United States government and its various agencies. (R.T. pp. 43, 44, 52, 55, 56.) The evidence introduced at the trial further showed that the appellees believed that the assets of the corporation exceeded its liabilities. (Tr. pp. 26, 27.)

Counsel for appellant has seen fit to quote from Collier on Bankruptcy in support of his argument that the appellees had reasonable cause to believe that the debtor was insolvent. A sufficient answer to this contention is found in Collier's work on Bankruptcy at page 997, where it is said:

“Apprehension or suspicion on the part of the creditor is not sufficient to constitute the ‘reasonable cause to believe’ which is required by #60 B of the Act. Reasonable cause to suspect is not always the equivalent of reasonable cause to believe”.

and at page 1001:

“It is difficult to formulate any well defined rules to determine the existence of a reasonable cause to believe that the debtor is insolvent. As indicated previously, whether or not a creditor receiving a preference has such reasonable cause to believe must ultimately be determined from the facts of each case. Consequently any controverted issue of fact is for the jury if the suit is at law, and where the evidence justifies a submission of the question, the finding of the jury is not reviewable. In every case there must be proof in the first instance that the debtor was actually insolvent at the time of the transfer and that the other elements of a preference are present, as well as proof of reasonable cause to believe on the part of the creditor or his agent acting with reference thereto, unless, of course, certain issues stand admitted by the pleadings or the pre-trial conference. In the absence of any requisite proof of reasonable cause to believe, the good faith of a creditor who receives a payment of his debt is

presumed; and the burden of proof rests with the trustee to rebut such a presumption and establish all the requisite elements plus reasonable cause to believe in the debtor's insolvency".

It has been held that reasonable cause for belief of insolvency is a question of fact and that the burden of proof is upon the trustee. In the case of *Marshall v. Nevins*, 242 Fed. 476 (9th C.C.A.) it was held at page 478:

"We are of the opinion that, while the circumstances might have led to the conclusion that Mrs. Nevins had reasonable cause to believe that the transfer by Hickman to her would effect a preference, and was intended to effect a preference, still whether such reasonable cause for belief existed was a question of fact with the burden of proof upon the trustee. The Supreme Court, in *Pyle v. Texan Transport and Terminal Co.*, 238 U.S. 90; 35 Sup. Ct. 667; 59 L. Ed. 1215 has very recently said:

"By the statute's very words, in order to set aside such a transfer and recover the property, it must appear that the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was thereby intended to give a preference. Whether such reasonable cause to believe existed is a question of fact, and the burden of proof is upon the trustee. *Grant v. National Bank*, 97 U.S. 80; 24 L. Ed. 971; *Barbour v. Priest*, 103 U.S. 293; 26 L. Ed. 478; *Coder v. Arts*, 213 U.S. 223; 29 Sup. Ct. 436; 53 L. Ed. 777; 16 Ann. Cas. 1008; *Wright v. Sampter* (D.C.) 152 Fed. 196.

“... The advantage of having heard and seen the witness must have aided greatly in turning the case one way or the other.”

In *Lang v. First Nat. Bank of Houston*, 215 F.2d 118, the Circuit Court upheld a finding made by the trial Court that a bank which had loaned money to the soon to be bankrupt and which subsequently took an assignment of accounts receivable to secure the payment of its note was not chargeable with having received a preference where the company went into bankruptcy within four months after the assignment of the accounts receivable. It is interesting to note that the bankrupt in the *Lange* case was a contractor whose principal dealings were with the Atomic Energy Commission, and agency of the United States government. The Circuit Court in upholding the judgment said:

“The past relationships between the appellee and the bankrupt had been successful, and we think that it was not unreasonable for the bank officers to take into consideration the nature of the business in which the bankrupt was engaged. It is well known in the business world that at a given time a large contractor may be insolvent in the sense that he owes more money than he has liquid assets; yet this is not necessarily insolvency in the legal sense. Rather it is only a shortage of cash or working capital, a situation which in the ordinary course of events can and will be remedied upon the completion of the contracts and the receipt of payment. His principal assets are not physical property such as real estate, equipment or inventory, but incorporeal

rights potentially of great value even though not readily turned into cash.

“To be sure, the Appellee knew that the bankrupt was having difficulty meeting current obligations—which, after all, was the reason working capital was needed. But it also knew that the bankrupt had several lucrative jobs in progress and that some were near completion. The past experiences with the bankrupt were such that the Appellee bank could reasonably expect payment of the loans, and the fact that a loan of \$100,000.00 was made after the December 22 loan was past due is indicative of the confidence its officers had in the bankrupt’s position. The slowness with which the bankrupt was meeting some obligations and the fact that it failed to pay the note due on January 21 were circumstances which would cause some inquiry to be made; and one was begun. The bankrupt showed the Appellee’s officer that there were more than a half-million dollars in retainages on one job alone, explaining that receipt of this amount would remedy the situation considerably.

“We think that this explanation was reasonable, and that under all the circumstances the Appellee was justified in not making inquiry into the legal solvency of the bankrupt. This being true, there is nothing in the record to require a finding that the payment of February 8 was anything more than a routine transaction similar to other payments made during the preceding year.

CONCLUSION.

It is respectfully submitted that the findings of fact made by the trial Court were supported by substantial evidence and that the judgment of the trial Court should therefore be sustained.

Dated, San Francisco, California,
February 18, 1957.

ALFRED M. MILLER,
Attorney for Appellees.

No. 15,299

United States Court of Appeals
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VS.

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Appellees.

APPELLANT'S CLOSING BRIEF.

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155 Montgomery Street, San Francisco 4, California,

Attorneys for Appellant.

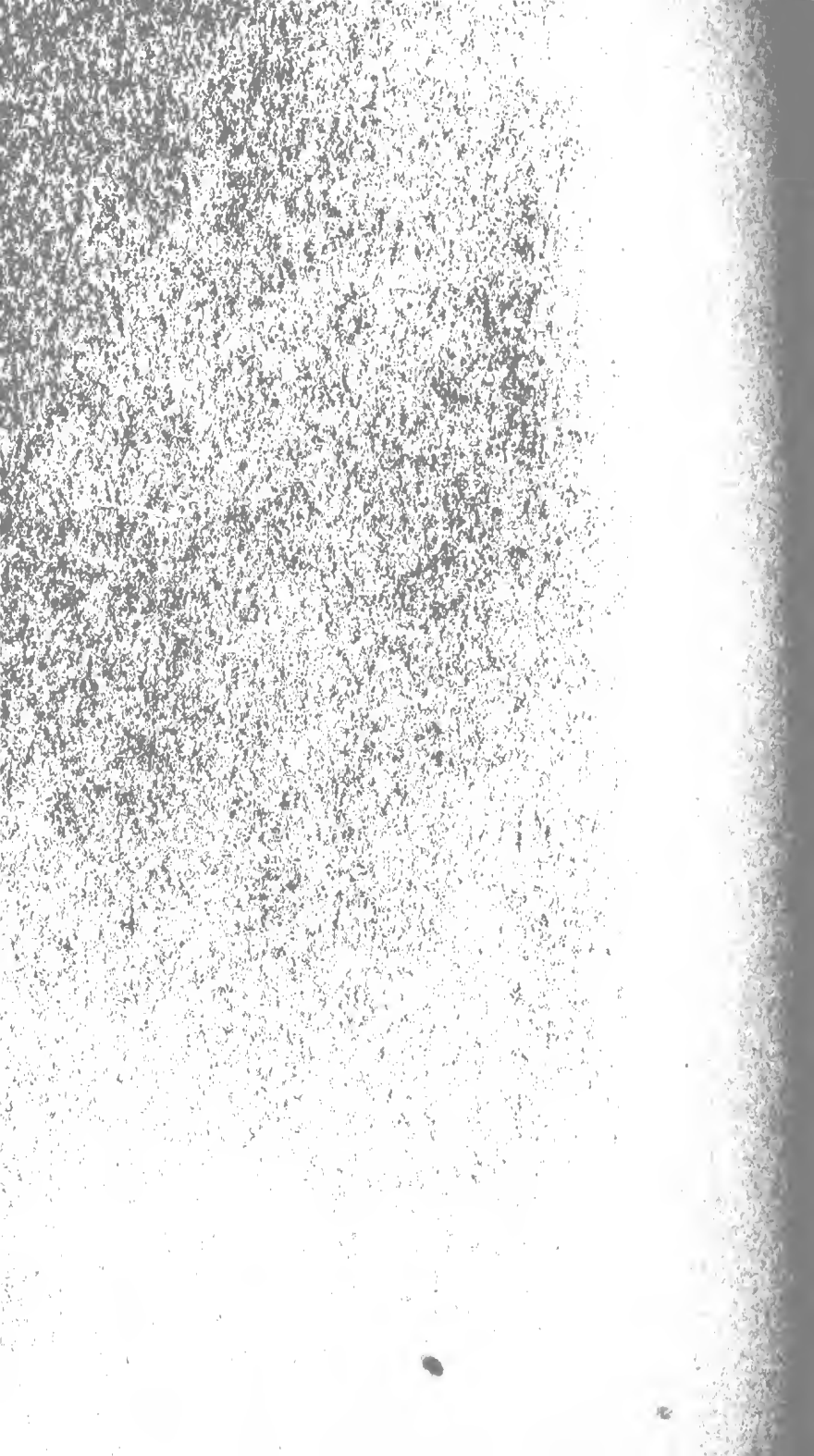
RAYMOND T. ANIXTER,

Of Counsel.

FILED

MAR 22 1957

PAUL P. O'BRIEN, CLERK



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Appellees.

APPELLANT'S CLOSING BRIEF.

APPELLEES' ADDITION TO APPELLANT'S STATEMENT OF FACTS CONTRARY TO EVIDENCE.

Appellees have adopted appellant's statement of facts, but have made certain additions thereto not supported by the record. There is nothing to support the contention that appellees' agreement to remain in bankrupt's service was a present consideration for the preferential payment of their back wages. This will be discussed more fully in replying to the point raised thereon by appellees.

There is also no evidence to support the statement made by appellees that bankrupts had claims in excess of \$150,000 for services rendered to the government. This point will be elaborated upon in reply to appellees' argument based thereon.

REPLY TO APPELLEES' ARGUMENT.

In endeavoring to answer our contention that the Court erred in finding that appellees agreed to remain in the employment of the bankrupt, Mechanix, Inc., (T.R. p. 8) appellees rely solely on a purported conflict in the evidence and the rule that the Court of Appeals cannot upset the findings of a trial Court where the evidence is conflicting and where different inferences might be drawn. However, this position is without support, as the Court refused to hear any testimony on this subject, and stated in so many words that it did not regard the question of an agreement to remain employed as an issue. The Court, although it completely shut out this line of testimony from the trial, made a finding on the subject. See T.R. pp. 60-62 inc.

“Q. (By Mr. Miller.) Mr. Morrow, was it your intention at the time you received this payment on March 8, 1953, to continue in the employ of Mechanix, Inc.?”

A. Yes, sir.

(Testimony of Marvin Morrow.)

Mr. Anixter. That is incompetent, irrelevant and immaterial.

A. Yes, sir.

Mr. Miller: I think it is important, your Honor. It could be consideration for the payment as a fact for the Court to consider.

The Court. I would assume that would be the case. Ask another question.

The Witness. I didn't finish my answer.

The Court. Well, I think we have heard enough. I will take it for granted that, whether

it is material or not, you were going to continue on in business if you could.

Mr. Miller. Did you want to ask a question, or did you tell me to?

The Court. I will answer it for him.

The Witness. I want to go a little further.

The Court. Well, you weren't going to leave the business, were you?

A. Yes, I was going to leave the company.

The Court. You were?

A. Yes, sir.

The Court. Then I was wrong.

The Witness. I wanted to explain to the Court why.

The Court. Well, what is the materiality of that? Why did you want to bring that out?

Mr. Miller. I think that would be a question of consideration for the payment, your Honor. That's the point I had in mind.

(Testimony of Marvin Morrow.)

The Court. I think there was already perfectly valid consideration for the payment.

Mr. Miller. No, I say as a matter of law, insofar as this proceeding is concerned, a present consideration should take it out of the preference class.

The Court. How could that be when he has already testified it was back payment that was owing from January, \$150.00 as a salary.

Mr. Miller. The point is, he received the payment in order to keep him on the job, which would make it a present consideration.

The Court. I don't think I would go into that. I don't see any merit in that. I don't think a man has to say he is going to stay on the job to get some money that is already owing him.

The Witness. I could explain that.

The Court. You don't need to. I don't think it is necessary. It is only a legal question. If money is owing to you, it is owing to you. A man doesn't have to stand on his head to get something that is already owing him.

Mr. Miller. I have no further questions of this witness."

This appellant having had his objections to this line of questioning sustained, did not pursue the matter any further. Hence, the Court's finding on this subject (T.R. p. 8) was amazing to say the least. Appellant should have had the opportunity to be heard on this point, but certainly could not go into it after appellees themselves were presumably prevented from raising this issue by the Court's ruling above quoted. Consider the ludicrous result of such testimony if it had been considered! The appellees would have been permitted to prove that the two chief stockholders who were also the president and secretary of the bankrupt corporation and who also were directors and between them managed and operated the company would have quit had they not been given preferential treatment over the general creditors of the corporation.

Thus there was not only a considerable lack of conflicting evidence which might support the trial Court's finding, but the District Judge's ruling permitted absolutely no evidence on this subject at all. We respectfully submit that this was not an issue in the case and could support no finding.

Appellees next argue that the Court did not err in finding that appellees did not know nor have reason-

able cause to believe that Mechanix, Inc. was insolvent, and in concluding thereupon that the payments to each of appellees was not preferential.

Appellees first insist that there is ample evidence showing that bankrupt was not insolvent. However, they carefully refrain from referring to any of the tangible proof in the record on this subject, and make only references to vague and self-serving statements, such as the amounts set forth in the bankrupt's schedules, which were prepared by appellees for bankrupt and which were not supported by the bankrupt's records. Plaintiff's Exhibit 1 was the bank balance sheet reflecting those conditions existing at the time the preferential payments were made. It showed a capital deficit of \$33,000.00. It indicated a considerably lesser sum due from claims against the Government than was set forth in the schedules. As the managing officers and directors of the bankrupt, appellees were chargeable with knowledge of the company's affairs and financial condition.

Matter of W. A. Silvernail Co., 218 Fed. 978, 33 Am. Br. 59;

Irving Trust Co. v. Roth, D.C. N.Y. 48 F. 2d 345.

Appellees' only basis for avoiding actual knowledge of insolvency rather than even a reasonable cause to believe the bankrupt to be insolvent was a purported belief that they had claims against the Government totaling over \$200,000. Although designated as claims the term in this instance was a considerable misnomer and represented a mere hope that the government

would pay the bankrupt for extras supplied in the way of materials and services not contained in the written contract between the bankrupt and the Government. Appellees admitted that their written contracts with the Government provided that authorizations for these extras were required to be obtained in writing from the Government and that the bankrupt had not obtained such authorizations (T.R. p. 69). Thus bankrupt didn't have any actual claims but only hopes. The actual value of these claims or hopes, whichever name is used to designate them, was assessed at the top sum of \$23,500 by plaintiff's witness, Peter Hunt, the attorney in charge of collecting these claims, and which was the only testimony on this subject (T.R. p. 84). There can be no doubt from the financial statement (plaintiff's exhibit 1) and the additional testimony referred to in appellant's opening brief that Mechanix Inc. the bankrupt, was hopelessly insolvent at the time the preferential payments were made five days before the petition in bankruptcy was filed against them.

Appellees had reasonable cause to believe that bankrupt was insolvent when they received these payments on their back salaries. Their authorities, with which we do not quarrel, in view of the fact that they are not applicable to the present situation, merely support the contention that mere suspicion is not enough to charge a creditor with knowledge. These cases have no reference to the condition existing in the case at bar where the creditors in question are the managing officers and directors as well as chief stockholders of

the bankrupt corporation. It is also submitted that the trustee met the burden of proof to charge appellees with such knowledge. The appellees, being the operating and managing officers as well as directors and chief stockholders of the bankrupt were presumed to have knowledge of the company's insolvency and its general conditions.

Matter of W. A. Silvernail Co. (supra);

Irving Trust Co. v. Roth (supra);

Cohen v. Tremont Trust Co. (D.C., Mass.), 256 Fed. 399 aff'd 263 F. 81;

New York Credit Men's Ass'n v. Hasenberg, (D.C., N.Y.), 26 F. Supp. 877 aff'd 107 F. 2d 1020;

In re Plant, 148 Fed. 37.

Appellees were also convinced of the truth and the existence of this legal presumption as they made no attempt to refute this argument, which was set forth in appellant's opening brief. As a matter of fact, if the operating and managing officers and directors of a corporation are not presumed to have knowledge of its condition, how could a corporation ever be charged and held responsible for any of its acts. Under these circumstances a creditor who was an officer and director of the corporation could never receive a preference because they would not be required to take cognizance of any facts they acquired in such capacity.

Even the trial Court was convinced that appellees had knowledge of the insolvent condition of the corporation. See oral finding of Court (T.R. p. 91).

“The Court. I am satisfied they must have felt conditions were getting tight, and they took the money, whether it amounted to a legal status recovery, but with knowledge they were insolvent and with interest to actually prefer themselves.”

Yet notwithstanding this oral finding, the trial judge made a contrary finding in writing. Appellees had no comment to make about this situation which was fully disclosed in appellant's opening brief. In fact, how can the trial judge's written and oral findings be reconciled?

The trial Court was convinced by the evidence that appellees received a preference but seemed to justify itself on the basis that officers of a corporation are not to be considered in the same class with other creditors (T.R. p. 93).

“The Court. Well I will think it over for a day or two. I don't think much of the case Mr. Anixter; most cases of preference are where a creditor comes in and gets the pay in preference against other creditors.”

Thus, the trial Court gives its approval to the officers and directors of a corporation who fill their own pockets on the eve of bankruptcy with assets belonging to the general creditors, when these general creditors relied on such officers and directors in dealing with the corporation. This is contrary to the purport of the Bankruptcy Act.

Matter of W. A. Silvernail Co., supra;

Irving Trust Co. v. Roth, supra;

Cohen v. Tremont Trust Co., supra.

Appellees cite the case of *Lang v. First National Bank of Houston*, 215 Fed. 2d 118, because it involves dealings between a contractor and the Government. In no other respect is this case applicable to the situation at bar. The creditor in the *Lang* case was not an officer, director, nor stockholder of the bankrupt corporation and had nothing to do with its management and control. The Court found from the facts that the creditor had no reason to suspect bankruptcy. However, even in this case the Court reaffirmed the rule of law pointed out by appellant in his opening brief to the effect that where facts were raised to cause a person of reasonable prudence to make inquiries he would be charged with the knowledge that could be obtained from such investigation.

McDougal v. Central Union Conference, 2d Cir.
110 Fed. 2d 939;

Collins v. Bank of Titusville and Trust Co., 5th
Cir. 36 Fed. 2d 482.

If the managing officers and directors of a corporation performed only their proper functions they would have had knowledge of the corporation's affairs.

For the foregoing reasons the trustee contends that the findings of the trial Court (T.R. pp. 7-9) are unsupported by the evidence adduced and are inconsistent with the Court's own "oral findings" as hereinabove set forth in full.

Therefore, it is respectfully submitted that the judgment of the District Court should be reversed because the payments made by the managing officers and direc-

tors to themselves on account of back salaries at a time when the corporation was insolvent was preferential within the meaning of Section 60(b) of the Bankruptcy Act.

Dated, San Francisco, California,
March 20, 1957.

SHAPRO & ROTHSCHILD and
JAMES M. CONNERS,
By RAYMOND T. ANIXTER,
Attorneys for Appellant.

RAYMOND T. ANIXTER,
Of Counsel.

No. 15300

**United States
Court of Appeals**
for the Ninth Circuit

BRUCE G. BARBER, District Director, Immigra-
tion and Naturalization Service,
Appellant,

vs.

LAL SINGH,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JAN - 7 1957



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the
Northern District of California, Southern
Division

No. 35435

In the Matter of:

The Petition of LAL SINGH, for a Writ of Habeas
Corpus.

PETITION FOR WRIT OF
HABEAS CORPUS

To the Honorable the Judges of the United States
District Court for the Northern District of
California, Southern Division.

The petition of Lal Singh, hereinafter referred to
as petitioner, respectfully shows:

That the petitioner is unlawfull imprisoned, de-
tained, and restricted of his liberty by Bruce G.
Barber, District Director, Immigration and Natu-
ralization Service, San Francisco, California, here-
inafter referred to as respondent, in the said
Northern District of California, Southern Division
thereof; that said imprisonment, detention, confine-
ment, and restraint is illegal, and that the Illegality
thereof consists of this, to wit:

I.

Petitioner is a citizen of India and has resided in
the United States for nearly 30 years, to wit, since
the 10th day of January, 1927.

II.

Petitioner is detained by the respondent under an order that he be deported from the United States on the sole ground that he entered the United States without and immigrant visa on or about January 10, 1927, and respondent threatens to deport petitioner from the United States under said order.

III.

Prior to the issuance of said order, a hearing was held in the deportation proceedings in petitioner's case by Special Inquiry Officer H. H. Engelskirchen, and during said hearing petitioner filed an application for suspension of deportation.

IV.

There is annexed hereto, marked Exhibit A, and made a part hereof, a true copy of the decision and order of the said Special Inquiry Officer denying said application for suspension of deportation and directing that the petitioner be deported from the United States.

V.

Following the making of said order, petitioner filed an appeal from the order of the Special Inquiry Officer to the Board of Immigration Appeals at Washington, D. C., and there is annexed hereto, marked Exhibit B, and made a part hereof, a true copy of petitioner's appeal and of the decision of said Board of Immigration Appeals, dated December 2, 1955, directing that petitioner's appeal be dismissed.

VI.

Thereafter, petitioner filed a motion to reconsider with said Board of Immigration Appeals for the purpose of directing the attention of said Board to certain recent court decisions which petitioner believed would affect the decision entered in his case. On March 2, 1956, said Board of Immigration Appeals denied the motion to reconsider. A copy of petitioner's motion to reconsider and of the decision of the Board of Immigration Appeals denying said motion are annexed hereto, marked Exhibit C, and made a part hereof.

VII.

As will more fully appear from the annexed exhibits, the Board of Immigration Appeals has found that the petitioner's application for suspension of deportation must be considered under Section 244 of the Immigration and Nationality Act of 1952 (8 USC 1254) and that the petitioner had failed to meet the statutory requirements of said section, and the Board of Immigration Appeals denied the application for suspension of deportation.

VIII.

The decision of the Board of Immigration Appeals is clearly erroneous in that (1) the application for suspension of deportation should have been considered under the provisions of Section 19 of the Immigration Act of 1917, as amended (8 USC 155), instead of Section 244 of the Immigration and Nationality Act of 1952 (8 USC 1254), because the deportation proceeding was instituted prior to De-

cember 24, 1952, and the proceeding was saved by the provisions of the savings clause of the Immigration and Nationality Act of 1952 (Section 405) (8 USC 1101 footnote); (2) The petitioner meets the statutory requirements for suspension of deportation under both Section 19 of the Immigration Act of 1917 and under Section 244 of the Immigration and Nationality Act of 1952.

IX.

By reason of the premises, the petitioner has been denied a fair hearing and has been denied due process of law in that the Special Inquiry Officer and the Board of Immigration Appeals have denied his application for suspension of deportation and ordered him deported from the United States as the result of erroneous conclusions of law.

X.

No prior petition for a writ of habeas corpus has been made in regard to the detention and restraint complained of herein.

XI.

During the pendency of said deportation proceedings, petitioner has at all times been at large under bond in the sum of \$1,000 and has at all times appeared before the immigration authorities whenever he has been called upon to do so.

Wherefore, petitioner prays that a writ of habeas corpus issue herein, directed to Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, commanding

him to have the body of said petitioner before this court at a time and place therein specified, to do and receive what shall then and there be considered by this court concerning said petitioner.

Dated: May 1, 1956.

/s/ MILTON T. SIMMONS,
Attorney for Petitioner.

Duly verified.

EXHIBIT A

United States Department of Justice
Immigration and Naturalization Service

(Copy)

Oct. 7, 1955.

File: A2 549 749—San Francisco

In Re: Lal Singh

In Deportation Proceedings

In Behalf of Respondent: Wayne Collins, Attorney
at Law, Mills Tower Building, San Francisco,
California.

Charges:

Warrant: Immigration Act of 1924—Immigrant—No visa.

Lodged: None.

Application: Suspension of deportation—Section
244(a)(1) of the Immigration and Nationality

Act—Exceptional and extremely unusual hardship.

Warrant of Arrest Served: September 22, 1950.

Discussion as to Deportability: This record relates to a 50-year-old divorced male alien, a native and citizen of India. The respondent testified he last entered the United States at Key West, Florida, about January 10, 1927, without inspection. He further testified at the time of his last entry it was his intention to seek employment and remain in the United States and that he was not in possession of a valid unexpired immigration visa. The charge contained in the warrant of arrest is sustained by the evidence of record.

Discussion as to Eligibility for Suspension of Deportation: The respondent testified that he was twice married in India: that his first wife died about 1920; and that his second wife divorced him about 1947 or 1948. He has no children by either marriage. He has no relatives in the United States. The respondent is a self-employed farmer whose net annual income apparently averages about \$1000. His total assets consisting principally of his equity in fruit orchards amount to about \$28,000. The record has established the respondent has been physically present in the United States for more than the past seven years. He is a quota immigrant without preference chargeable to the quota for India, which is heavily oversubscribed and he cannot readily obtain an immigrant visa if granted the privilege of voluntary departure and pre-examination.

A check of the appropriate local and federal records disclosed that the respondent was arrested for violation of the Passport Act of 1918 in 1925, and for drunk driving on three occasions between 1936 and 1941. He testified he was also arrested for drunk driving in 1954 and fined \$158. Inquiry has disclosed that the alien has no connection with any subversive groups. Affidavits of witnesses attesting to the respondent's good moral character for more than the past seven years have been received in evidence. However, before reaching a conclusion as to whether or not the respondent has been a person of good moral character for at least seven years immediately preceding his application for suspension of deportation, it is necessary to examine his immigration record.

The respondent was apprehended by immigration authorities in the vicinity of San Diego, California, about July 29, 1925, for unlawfully entering the United States and was deported via San Francisco, California, on February 27, 1926. The record of the warrant hearing accorded him in that proceeding on August 3, 1925, shows that the respondent testified he entered the United States about July 27, 1925, near Calexico, California, without inspection, and that he had never previously lived in the United States. It is noted in recent years he has made several sworn statements to officers of the Immigration and Naturalization Service in which he claimed he first entered the United States in 1923; also that on occasion he refuted that claim and stated his origi-

nal entry occurred near Calexico, California, in 1925. The record also discloses that the respondent executed an application for registry of an alien under the Nationality Act of 1940, under oath, before an officer of the Immigration and Naturalization Service at Salinas, California, on November 29, 1949, in which he alleged that he arrived in the United States on January 10, 1923, at Key West, Florida; that since the date of that entry he had never been absent from the United States; and that he had never been deported. This application for registry was denied by the Assistant Commissioner of Immigration and Naturalization on May 22, 1950, on the grounds that the respondent (1) failed to establish he entered the United States prior to July 1, 1924; (2) he failed to establish continuous residence in the United States since prior to July 1, 1924; (3) he failed to establish good moral character; and (4) he is subject to deportation.

In this proceeding the respondent has admitted he falsely and deliberately made the foregoing allegations in his registry application in an effort to adjust his immigration status and remain in the United States. These false allegations were especially material in a registry proceeding and are tantamount to perjury. They also indicate a flagrant disregard of the solemnity of an oath and for the immigration laws. Moreover, the record would indicate the respondent's attempt to perpetrate a fraud in connection with his application for registry it is

not an isolated act of deceit in his dealings with the immigration authorities but rather a culmination of the deceit and evasion he practiced in matters relating to immigration.

It is therefore concluded that the respondent's false allegations in his registry application preclude a finding that he has been a person of good moral character for the past seven years. It is further concluded that the respondent has failed to establish he is statutorily eligible for suspension of deportation under the provisions of Section 244(a)(1) of the Immigration and Naturalization Act by reason of his failure to establish good moral character for the entire statutory period and his application for suspension of deportation is hereby denied. He is found to have been a person of good moral character for the past five years and is hereby granted the privilege of voluntary departure in lieu of deportation. The respondent stated in the event he is ordered deported, he desires to be sent to India. He can return to that country without fear of physical persecution.

Findings of Fact: Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of India;

(2) That the respondent last entered the United States at Key West, Florida, about January 10, 1927, without being inspected by immigration authorities;

(3) That the respondent at the time of his last entry into the United States intended to remain permanently in this country;

(4) That the respondent at the time of his last entry was not in possession of a valid unexpired immigration visa.

Conclusions of Law:

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 13 and 14 of the Immigration Act of May 26, 1924, the respondent is subject to deportation on the ground that, at the time of entry into the United States, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

Order: It is ordered that the respondent be granted voluntary departure, without pre-examination, at his own expense in lieu of deportation with such period of time or authorized extensions thereof and under such conditions as the district director or officer in charge having administrative jurisdiction of the office in which the case is pending shall direct.

It Is Further Ordered that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the respondent deported from the United States in the manner

provided by law on the charge contained in the warrant of arrest.

/s/ H. H. ENGELSKIRCHEN,
Special Inquiry Officer.

rpl.

EXHIBIT B

Before the Board of Immigration Appeals
Washington, D. C.

In re: Lal Singh

File A2 549 749

APPEAL FROM DECISION OF SPECIAL INQUIRY OFFICER

Statement of the Case

The appellant is a 50-year-old divorced male alien, a native and citizen of India. He last entered the United States at Key West, Florida, about January 10, 1927, without inspection, with the intention to seek employment and remain in the United States. He was not in possession of an immigration visa. It is conceded that the appellant is subject to deportation on the warrant charge.

He applied for suspension of deportation under the provisions of Section 244(a)(1). Application was made on the grounds that his deportation would result in extreme and exceptionally unusual hardship to himself and the fact that he had resided in

the United States continuously for nearly 30 years. The appellant is a self-employed farmer, with assets consisting of an equity in fruit orchards of approximately \$28,000. The record will disclose that he was convicted under the Passport Act in 1925 and after such conviction was deported from the United States. He has no criminal record during the past seven years, except an arrest in 1954 which resulted in a fine for drunk driving.

The special inquiry officer states that inquiry disclosed that the appellant has no connection with any subversive groups. Affidavits of witnesses were offered at the hearing attesting to his good moral character for more than the past seven years. However, the special inquiry officer denied suspension of deportation on the ground that the appellant had failed to establish good moral character for the required seven-year period because of certain alleged false testimony in a registry application. The appellant admits that in a registry proceeding in 1949 he alleged under oath that he had entered the United States in 1923 and had not been absent from this country since that time, and also that he had never been deported from the United States. He testified that he had misrepresented these facts because he had been informed that persons who had resided in the United States continuously since 1924 could remain here, and "I wanted to stay so badly that I told a lie." On the basis of the admitted misrepresentation in 1949, the special inquiry officer finds that the appellant has not established good moral

character for the past seven years but that he has established good moral character for the past five years, and therefore denied the application for suspension of deportation and granted the appellant voluntary departure.

Argument

It is our contention that the special inquiry officer erred in holding that the appellant had failed to establish good moral character for the past seven years. As this Board has stated on numerous occasions, good moral character does not constitute moral excellence and a single fall from grace does not preclude a finding of good moral character. The Board has so held in numerous cases in which aliens have made false claims of United States citizenship under oath for the purpose of concealing illegal residence in the United States and avoiding deportation. Several of these decisions have been affirmed by the Attorney General. (In the Matter of B * * *, 1 I&N Dec. 611; In the Matter of B * * *, 2 I&N Dec. 492; In the Matter of V * * *, 2 I&N Dec. 606; In the Matter of K * * *, 3 I&N Dec. 180.)

The Board has also held that conviction of petty theft during the statutory period for which good moral character is required does not preclude a finding of good moral character. (In the Matter of T * * *, 2 I&N Dec. 614.)

We would particularly direct the attention of the Board to the Matter of U * * *, A-2741847 and A-2946078, decided March 4, 1947, and approved by

the Attorney General Mach 20, 1947, 2 I&N Dec. 830. The U * * * case is almost identical with the case of the appellant. The respondents in the U * * * case made false statements before an immigration officer to the effect that they had entered the United States prior to July 1, 1924, in order to obtain registry. They repeated the false statements on at least two other occasions. The Board stated in the U * * * case:

“Concededly, the false testimony given by the respondents with reference to their last entry into the United States amounted to perjury. The issue then is whether, because of perjury committed by them, they are estopped from showing good moral character for the required period of time so as to render them eligible for suspension of deportation. We have held that false testimony during deportation proceedings does not necessarily preclude a finding of good moral character (Matter of R * * *, 56124/971, Jan. 8, 1944). Good moral character should not be construed to mean moral excellence, nor is it destroyed by a single lapse. It is a concept of a person's natural worth derived from the sum-total of all his actions in the community (Matter of B * * *, 56130/885, Nov. 23, 1943; Matter of M * * *, 55964/176, Apr. 17, 1944; Matter of A * * *, 56052/439 (renumbered A-3595874), Dec. 28, 1943.) These views have also been expressed by the courts (In re Paoli, 49 F. Supp. 128). It has been said that depravity of character and violation of law are not necessarily wedded together (Petition of Schlau, 41

F. Supp. 161). The term "good moral character" is elusive and difficult of definition. On this theory it was said In re Hopp, 179 Fed. 561 and Turley v. United States, 31 F. (2d) 696, that it should not be construed to mean moral excellence or that it should be destroyed by a single lapse, but that it is something that measures up as good among the people of the community in which the party resides, that is, up to the standard of the average citizen; that in determining moral character the standard of the average American citizen as it exists today should be applied. Reputation which will pass muster with the average man is required; and that not every violation of law establishes bad moral character.

"* * *. Another peculiarity is that when the false statements were made, the apparent purpose was to secure registry, that is, legalization of their immigration status on the basis of an illegal entry prior to July 1, 1924; yet, there was available to them at that time suspension of deportation, the precise result which registry would have given them. The only ground of deportation is that they did not have immigration visas when they entered this country in 1925."

The appellant's sole motive in making false statements, as in the U * * * case, resulted from his eagerness to remain in the United States. The appellant could have applied for suspension of deportation, and the only ground of deportation in his case is the fact that he did not have an immigration

visa at the time of his entry. We submit that the U * * * case is ample authority for a finding that the appellant has been a person of good moral character for the statutory period, notwithstanding his misrepresentations in registry proceedings.

We are not unmindful of the fact that all of the cited decisions occurred prior to the enactment of the Immigration and Nationality Act of 1952, whereas in the appellant's case the proceedings were conducted under the provisions of the 1952 Act and application for suspension of deportation was made under Section 244(a)(1) of the Immigration and Nationality Act. However, we believe the standards of good moral character under the present Act are exactly the same as under prior legislation, except so far as they have been changed by Section 101(f) of the Immigration and Nationality Act. The only subdivision of Section 101(f) which might be held to have any bearing on this case would be subsection (6), which provides, "One who has given false testimony for the purpose of obtaining any benefits under this Act" shall not be regarded as a person of good moral character. We do not believe this subsection applies, however, because the false testimony in this case was given prior to the enactment of the 1952 Act for the sole purpose of gaining benefits under a prior immigration Act, i.e., registry. Consequently, the decision of this Board in the Matter of Z * * *, E-085577, decided November 12, 1953, 5 I&N Dec. 514, does not preclude a finding of good moral character in the case of the appellant.

As the Board stated in the Matter of K * * *, A-6092065, 3 I&N Dec. 69, in considering the case of an alien who was convicted of false claims of citizenship during the five-year period, "We note that misrepresentations set forth in the indictment were all part and parcel of respondent's attempt to hide his illegal entry in 1931. They were not motivated by any venal purposes." The Board also stated, "While we do not condone respondent's illegal actions in misrepresenting himself as a citizen, we nevertheless do not think that he is precluded from establishing his good moral character. Considering the record in its entirety, we think that he does have the requisite character to establish his eligibility for voluntary departure." The Board has also held that the same standard applies to both voluntary departure and suspension of deportation in determining what constitutes good moral character. (In the Matter of A * * *, 2 I&N Dec. 731.)

We note that the special inquiry officer states that the misrepresentations in the registry proceedings were not an isolated act, but the culmination of deceit and evasion practiced in matters relating to immigration. Such a statement is not established by the record. There were some discrepancies in his testimony at various times between 1949 and 1951. All of the statements made during that period were in relation to investigations following his application for registry and were apparently taken without benefit of an interpreter. The appellant does not admit having made any false statement in any of

these subsequent proceedings, and it may well be that the discrepancies contained therein are the result of misunderstanding rather than deliberate misrepresentations. It is noted that the last statement in 1951 is within the five-year period in which the special inquiry officer finds that the appellant has established good moral character. In any event, the testimony in all of these cases, if it were false, would not preclude a finding of good moral character because it was all in relation to the registry proceeding and would have constituted a single lapse of character, as in the cases of *In the Matter of K * * **, 3 I&N Dec. 180, and *In the Matter of U * * **, 2 I&N Dec. 830.

Conclusion

We respectfully submit that the appellant should be found to have established good moral character for the statutory period and that suspension of deportation should be granted for the following reasons:

1. The appellant has resided in the United States for nearly 30 years.
2. His deportation would involve extremely and exceptionally unusual hardship in that he has been absent from his native country ever since his youth, has resided in the United States during all of his adult life, and has acquired in the United States substantial agricultural holdings which he would be forced to sacrifice.

3. The appellant has during his stay in the United States become a substantial agriculturalist, he is highly recommended by neighbors and business associates in his community and has submitted ample evidence of good moral character for the past seven years.

4. The special inquiry officer's sole reason for denying suspension of deportation was the misrepresentations made by the appellant in 1949 in his effort to remain in the United States.

5. The finding in many cases by this Board that a single lapse does not preclude a finding of good moral character.

6. Considering the nature and the cause for the appellant's misrepresentations together with the other evidence of record, he has established that he is a person of good moral character.

Respectfully submitted,

.....,
MILTON T. SIMMONS,
Attorney for Appellant.

November 8, 1955.

Before the Board of Immigration Appeals
Washington, D. C.

In re: Lal Singh

File A2 549 749

Supplemental Appeal from Decision of
Special Inquiry Officer

Subsequent to the filing of the brief of appeal in this case, the appellant delivered to counsel a number of letters from civic officials and prominent business and professional men in the vicinity of his residence. These documents support our contention that the appellant is highly regarded and well recommended by the leaders of his community and that he has been a person of good moral character for more than the statutory period. It is requested that the following documents be considered together with our appeal brief dated November 8, 1955.

1. Statement of the Bank of America, Sutter County Branch, dated November 9, 1955.

2. Letter of Robert W. Steel, Attorney at Law, dated November 9, 1955.

3. Letter of Laurence H. Barnett, District Supervisor, Hunt Foods, Inc., dated November 8, 1955.

4. Letter of the Sutter County Treasurer and Tax Collector, dated November 8, 1955.

5. Letter of Richard R. Wilbur, Yuba City, California, dated November 8, 1955.

6. Letter of Sheriff, Sutter County, California, dated November 8, 1955.

7. Letter of Bachan S. Teja, Director, California Canning Peach Association, dated November 8, 1955.

Respectfully submitted,

.....,
MILTON T. SIMMONS,
Attorney for Appellant.

November 10, 1955.

United States Department of Justice
Board of Immigration Appeals

(Copy)

Dec. 2, 1955.

File: A-2549749—San Francisco

In re: Lal Singh

In Deportation Proceedings

In Behalf of Respondent: Wayne Collins, Esquire,
Mills Tower Building, San Francisco, California.

Charges:

Warrant: Immigration Act of 1924—Immigrant—No Visa

Lodged: None

Application: Suspension of deportation.

This is an appeal from an order entered by the special inquiry officer on October 7, 1955, finding

that the respondent is subject to deportation on the warrant charge, but granting to him the privilege of departing voluntarily from the United States upon compliance with certain conditions. The respondent's request that his deportation be suspended under the provisions of Section 244(a)(1) of the Immigration and Nationality Act was denied by the special inquiry officer on the basis that the respondent had not established statutory eligibility for consideration of this form of relief. Deportability on the warrant charge is conceded.

The factual situation has been set forth in the order appealed from and need not be fully reiterated here. Briefly, the record relates to a 50-year-old divorced male, a native and citizen of India, who testified that he last entered the United States through the port of Key West, Florida, in January, 1927. He further testifies that he affected this entry without inspection and that it was his intention at that time to remain permanently in the United States although he was not in possession of proper documents to so do.

We have given careful consideration to counsel's argument that the respondent has established that he has been a person of good moral character for the requisite period to be statutorily eligible for consideration for the relief sought.

The cases relied upon by counsel admittedly are cases which established precedences for the establishment of good moral character prior to the effec-

tive date of the Immigration and Nationality Act of 1952. That Act, however, by Section 101(f) sets forth specific classes of aliens who may not be found to be of good moral character. Counsel points out that the alien would not be precluded from establishing that he had been of good moral character by Subsection (6) of this Section inasmuch as his false testimony was not for the purpose of obtaining any benefits under this Act. In this, we concur. The concluding paragraph of Section 101(f) provides that the fact that an alien is not within any of the specific provided classes of aliens who may not be found of good moral character does not preclude a finding that for other reasons an alien may be found not to be of good moral character.

We concur fully in the reasons set forth by the special inquiry officer as his basis for holding that the respondent has not established that he was of good moral character and therefore, basically eligible for consideration for suspension of deportation. The evidence fully supports that the respondent admits making false statements under oath in connection with his application for registry on November 29, 1949. These statements considered with other factors relating to the respondent's status as an immigrant in the United States, we find, preclude a finding of good moral character. In view thereof, the appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman.

EXHIBIT C

(Copy)

Before the Board of Immigration Appeals
Washington, D. C.

In the Matter of
LAL SINGH, in deportation proceedings.

MOTION TO RECONSIDER

Introduction

This motion relates to a 50-year-old native and citizen of India whose application for suspension of deportation was denied by the special inquiry officer on October 7, 1955, on the ground that the respondent had failed to establish good moral character for the past seven years. In dismissing our appeal and affirming the order of the special inquiry officer, the Board of Immigration Appeals relied on the concluding paragraph of Section 101(f) as setting up a different standard of good moral character than that applied by the Board in deciding the same question under prior laws.

Subsequent to the decision of the Board of Immigration Appeals on December 2, 1955, our attention was directed to a decision of the United States District Court for the Northern District of California (Jose Esteban Romero-Garcia vs. Barber, No. 34639 (not reported)) relating to applications for suspension of deportation and the savings clause of the Immigration and Nationality Act. This decision,

considered together with other recent decisions of the Supreme Court and Court of Appeals, leads us to the conclusion that the respondent's application for suspension of deportation must be decided under the 1917 Act alone. The Board having relied on the provisions of the Immigration and Nationality Act in denying the application, we request the Board's reconsideration.

Statement of the Case

In the decision of December 2, 1955, the Board stated: "The cases relied upon by counsel admittedly are cases which established precedences for the establishment of good moral character prior to the effective date of the Immigration and Nationality Act of 1952. That Act, however, by Section 101(f), sets forth specific classes of aliens who may not be found to be of good moral character." The Board then cited the concluding paragraph of Section 101(f) and determined that the alien's false statements in an application for registry "considered with other factors relating to the respondent's status as an immigrant in the United States" precludes a finding of good moral character. We do not know what other factors relating to the respondent's status as an immigrant were considered by the Board. We do know, however, that one of the cases cited in our brief, and which the Board states established precedents for the establishment of good moral character under the prior law, is on all fours with the case of the respondent. Matter of U * * *, 2

I&N Dec. 830. We can only conclude, therefore, that if this case were to be decided under the laws in effect prior to December 24, 1952, suspension would have been granted.

In the Romero-Garcia case, *supra*, the alien was arrested in deportation proceedings on March 12, 1951. He applied for suspension of deportation on September 19, 1952. At his hearing on December 12, 1952, suspension of deportation was denied and he was ordered deported from the United States. No appeal was taken, but on March 13, 1953, a motion to reopen was made, which was denied on March 20, 1953. On appeal from the denial of the motion to reopen, the Board of Immigration Appeals granted voluntary departure, but held that Romero-Garcia was ineligible for suspension of deportation because his application for suspension had not been timely filed. Judge Goodman did not prepare a memorandum decision, but his judgment read as follows:

“1. That plaintiff’s application was timely filed in accordance with the provisions of 19(c)(2) of the Immigration Act of 1917 (8 USC 155) prior to December 24, 1952, the effective date of the Immigration and Nationality Act of 1952 (PL 414, 66 Stat 163).

“2. That plaintiff’s application for suspension of deportation is hereby remanded to defendant to rehear the same on the merits in accordance with applicable statutes and regulations.”

This places an entirely new light upon the respondent's case as affected by the last sentence of Section 405(a) of the Immigration and Nationality Act, but one well supported by the prior decisions of the Supreme Court and the Court of Appeals. The respondent having been arrested on September 22, 1950, has had a deportation proceeding pending since that time. By the provisions of Section 405(a) of the Immigration and Nationality Act, nothing in the new Act will affect the validity of the respondent's deportation proceeding, but as to such proceeding the statutes repealed by the Immigration and Nationality Act are continued in force and effect. An application for suspension of deportation being a part of the deportation proceedings, it is our theory that the respondent's application for suspension of deportation should have been decided pursuant to the provisions of the Immigration Act of 1917 and not under Section 245 of the Immigration and Nationality Act. We are aware of the last sentence of Section 405(a) of the Immigration and Nationality Act, but in our opinion that sentence does not conflict with the foregoing theory. We believe that the last sentence of the savings clause (Sec. 405(a)) has no bearing on applications for hearing, but merely provides that an application for suspension of deportation made by an alien who had no deportation proceeding pending may be considered as a "proceeding" if filed prior to the date of the enactment of the Immigration and Nationality Act (June 28, 1952).

Argument

I.

The 1917 Act Applies to the Respondent's Deportation Proceeding, Including His Application for Suspension of Deportation

This Board is familiar with the decision of the Supreme Court in *United States vs. Menasche*, 75 S. Ct. 513, and of the Court of Appeals in *U. S. ex rel. Zacharias vs. Shaughnessy*, 221 F. 2d 578, and *Aure vs. United States*, 225 F. 2d 88, interpreting the savings clause of the Immigration and Nationality Act (Section 405(a)). These decisions and certain District Court decisions have clearly established the broad scope of the savings clause.

The cited cases, together with prior decisions of the Board, show that as to a deportation proceeding instituted prior to the effective date of the Immigration and Nationality Act, the prior law continued in full force and effect. The special inquiry officer recognized this to be a fact when in the respondent's case at the conclusion of the hearing he stated:

“You will be served with a signed copy of my decision and given a period of not to exceed ten business days in which to file an appeal. In the event the decision is adverse to this respondent, your appeal may be accompanied by a written argument or brief. Since the warrant of arrest in this case was served on September 22, 1950, there will be no fee for filing an appeal.”

and thereafter in his decision found the alien to be deportable under the 1924 Act.

We believe that the Board will concede that as to the respondent's deportation proceeding the 1917 Act and the 1924 Act remain in full force and effect. However, both the special inquiry officer and this Board have considered the respondent's application for suspension of deportation under the provisions of the Immigration and Nationality Act rather than the 1917 Act, apparently because it was not filed until April 12, 1955.

We understand that the Immigration and Naturalization Service takes the view that the last sentence of the savings clause (Section 405(a)), which reads:

“An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.”

requires that all applications for suspension of deportation filed after the date of enactment of the Immigration and Nationality Act must be considered under the provisions of that Act rather than the Act of 1917. We do not agree.

This Board is familiar with the practice which existed for a number of years prior to the enactment of the Immigration and Nationality Act whereby an alien who believed himself to be subject to deporta-

tion and eligible for suspension of deportation could voluntarily file an application for such relief. Thousands of such applications were filed and the Service was literally swamped with the processing of such cases. In some districts applications would lie dormant for as long as two or three years waiting to be processed. No deportation proceeding was instituted by the issuance of a warrant of arrest until such time as the case was finally processed and ready for a "short form" hearing. During this same period, however, aliens under deportation proceedings could, during the course of the regular deportation hearing, apply for suspension of deportation. Consequently there were two types of suspension of deportation cases before the Service. We do not believe that the last sentence of Section 405(a) was meant by Congress to be a restriction on the savings clause so far as applications for suspension of deportation filed in "saved" deportation proceedings are concerned. We believe that Congress meant the last sentence of Section 405(a) to be an extension of the scope of the savings clause, to include as "saved" proceedings those applications for suspension of deportation filed prior to the date of enactment in which no deportation proceeding had been instituted. It should be noted that the last sentence of the savings clause includes applications under Section 4 of the Displaced Persons Act as well as applications for suspension of deportation. There were thousands of unprocessed applications under the Displaced Persons Act during this same period.

Our view is supported by the Romero-Garcia case, *supra*. Judge Goodman's decision is quoted above. If Judge Goodman considered the last sentence as a restriction on filing of an application in a deportation proceeding after June 28, 1952, he would have dismissed the petition for a writ of habeas corpus, but he found that the application, filed September 19, 1952, was timely filed in accordance with Section 19(c)(2) of the Immigration Act of 1917, and remanded the case to the Immigration Service for a hearing on the application for suspension of deportation. We submit that the respondent's application for suspension of deportation should be considered under the provisions of Section 19(c)(2) of the Act of February 5, 1917, and not under the Immigration and Nationality Act.

II.

The Respondent Is Not Only Eligible for but Should Be Granted Suspension of Deportation under Sec. 19(c)(2) of the Act of 1917

As the Supreme Court in *United States vs. Menasche*, *supra*, stated:

“The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, *manifests a well establish Congressional policy not to strip aliens of advantages gained under prior laws*. The consistent broadening of the savings provision, particularly in its general terminology, *intended to*

apply to matters both within and without the specific contemplation of Congress.” (Italics added.)

and as Judge Goodman stated in *Ex parte Robles-Rubio*, 119 F.S. 610:

“The savings clause in the 1952 Act is one of of unusual breadth as is appropriate to a statute which effects a complete revision of the immigration and naturalization laws of the nation. The breadth of the savings clause is indicative of the Congressional awareness that the 1952 Act would inevitably have unforeseen effects upon pre-existing statuses and conditions, and the Congressional desire to avoid such effects insofar as possible.”

so we would say in this case that it was not the intent of Congress to strip this respondent of an advantage gained under the prior law. The respondent had a definite advantage under the prior law, in that Section 19(c)(2) requires that he prove only five years good moral character to be eligible for suspension of deportation, whereas under the Immigration and Nationality Act seven years of good moral character must be proved. This is particularly important because in granting the respondent voluntary departure the special inquiry officer and the Board found him to be a person of good moral character for the past five years, but suspension of deportation was denied on the ground that he failed to establish good moral character for the required

seven-year period. In view of this finding, we submit that he would be eligible for suspension of deportation under the provisions of Section 19(c)(2) of the Act of February 5, 1917.

We would again direct the attention of the Board to the cases cited in our appeal brief and which the Board agrees established precedents for the establishment of good moral character prior to the effective date of the Immigration and Nationality Act. In the Matter of U * * *, *supra*, the aliens involved gave false testimony in a registry proceeding that they had entered the United States prior to 1924. They repeated the false statements on at least two other occasions. The Board stated in the U * * * case:

“Concededly, the false testimony given by the respondents with reference to their last entry into the United States amounted to perjury. The issue then is whether, because of perjury committed by them, they are estopped from showing good moral character for the required period of time so as to render them eligible for suspension of deportation. We have held that false testimony during deportation proceedings does not necessarily preclude a finding of good moral character (Matter of R * * *, 56124/971, Jan. 8, 1944). Good moral character should not be construed to mean moral excellence, nor is it destroyed by a single lapse. It is a concept of a person's natural worth derived from the sum-total of all his actions in the community (Matter of M * * *, 55964/176, Apr. 17, 1944; Matter of A * * *,

B * * * 56130/885, Nov. 23, 1943; Matter of 56052/439 (renumbered A-3595874), Dec. 28, 1943.) These views have also been expressed by the courts (In re Paoli, 49 F. Supp. 128). It has been said that depravity of character and violation of law are not necessarily wedded together (Petition of Schlau, 41 F. Supp. 161). The term "good moral character" is elusive and difficult of definition. On this theory it was said In re Hopp, 179 Fed. 561 and Turley v. United States, 31 F. (2d) 696, that it should not be construed to mean moral excellence or that it should be destroyed by a single lapse, but that it is something that measures up as good among the people of the community in which the party resides, that is up to the standard of the average citizen; that in determining moral character the standard of the average American citizen as it exists today should be applied. Reputation which will pass muster with the average man is required; and that not every violation of law establishes bad moral character.

"* * *. Another peculiarity is that when the false statements were made, the apparent purpose was to secure registry, that is, legalization of their immigration status on the basis of an illegal entry prior to July 1, 1924; yet, there was available to them at that time suspension of deportation, the precise result which registry would have given them. The only ground of deportation is that they did not have immigration visas when they entered this country in 1925."

The fact that the perjury was committed during the five-year statutory period in the U * * * case did

not preclude a finding of good moral character by this Board.

The respondent's only admission of having testified falsely relates to the 1949 registry proceedings prior to the five-year period for which good moral character must be proven. We do not believe that the record supports the allegations by the special inquiry officer that the respondent has made several sworn statements claiming entry in 1923 and that his misrepresentation in the registry proceeding was the culmination of the deceit and evasion he practiced in matters relating to immigration. The record contains reference to two statements by the alien in 1950 and 1951 (Exhibits 10 and 11), both of which were subsequent to the registry proceeding. There is no evidence whatever of any deceit or evasion prior to the 1949 misrepresentations in the registry proceeding. The subsequent statements in 1950 and 1951 were related to the registry application. Since there was no interpreter present during the 1950 and 1951 statements, it is doubtful whether the respondent and the officer understood each other and whether any misrepresentation occurred. In any event, his conduct was no different than that of the aliens in the U * * * case, *supra*, who made at least two subsequent statements regarding entry prior to 1924. The motive in both cases was the same—eagerness to remain in the United States.

We submit that the respondent has established eligibility for suspension of deportation under the

provisions of Section 19(c)(2) of the Immigration Act of 1917. The respondent has resided in the United States for nearly 30 years. He has submitted evidence during the deportation proceedings, and again with the appeal brief, establishing that he is highly recommended by his neighbors and business associates in the community. During these years in the United States he has acquired substantial agricultural holdings which he would be forced to sacrifice if he were ordered deported from the United States.

Conclusion

We respectfully submit that the Board reconsider its decision and that the respondent be granted suspension of deportation for the following reasons:

1. That the respondent's application for suspension of deportation is to be considered under the provisions of Section 19(c)(2) of the Immigration Act of 1917.

2. That the special inquiry officer and the Board have found that the respondent has been a person of good moral character for the period required under Section 19(c)(2).

3. That the respondent has resided in the United States for nearly 30 years.

4. That his deportation would involve extreme and exceptionally unusual hardship in that he has been absent from his native country ever since his youth, has resided in the United States during all of his adult life, and has acquired in the United States

substantial agricultural holdings which he would be forced to sacrifice.

Respectfully submitted,

.....
MILTON T. SIMONS,
Attorney for Respondent.

December 21, 1955.

(Copy)

U. S. Department of Justice
Board of Immigration Appeals
March 2, 1956.

File: A-2549749—San Francisco

In the Matter of

LAL SINGH in Deportation Proceedings

In Behalf of Respondent: Milton T. Simmons, Esquire, 220 Bush Street, San Francisco 4, California.

Deportable: Act of 1924—No immigrant visa.

This motion requests reconsideration of the decision of this Board of December 2, 1955, which denied an application for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act of 1952. Counsel contends that the special inquiry officer and this Board were in error

in considering the respondent's application for maximum relief under the provisions of Section 244(a)(1) of the Immigration and Nationality Act. It is argued that since the proceedings were instituted prior to the enactment of the Immigration and Nationality Act of 1952, such application should have been considered under the Immigration Act of February 5, 1917, as amended. The purpose of the motion is for the consideration now of respondent's application under Section 19(c) of the Act of February 5, 1917, as amended. Counsel admits that no formal application for suspension of deportation was filed by the respondent until April 12, 1955. Counsel has referred to certain judicial decisions to support his request for reconsideration. We have examined those decisions. Only two decisions appear relevant to the issue, namely, *Romero-Garcia v. Barber* (unreported); and *Miyagi v. Brownell*, 227 F. 2d 33 (CCA D.C. 10/13/55).

This respondent, a 50-year-old male alien, a native and citizen of India, last entered the United States about January 10, 1927. The warrant of arrest was served September 22, 1950. The initial hearing was accorded February 8, 1954, at the conclusion of which the alien applied for suspension of deportation. He was given the required form which he executed and filed in the resumed hearing on April 12, 1955. He had made no request for suspension of deportation during the life of the Immigration Act of Feb. 5, 1917, as amended.

The instant case is distinguishable from the case,

Jose Esteban Romero-Garcia v. Barber (unreported) in that Romero-Garcia filed an application for suspension of deportation in warrant proceedings on September 19, 1952. The court held that the term "enactment" as used in Section 405(a) Immigration and Nationality Act meant the effective date of the Act (12-24-1952) and not the date of its passage (6-27-1952).¹ In effect the Romero-Garcia decision holds that an application for suspension filed on September 19, 1952, which was prior to the effective date of the Immigration and Nationality Act on December 24, 1952, was timely filed within the provisions of Section 405(a) Immigration and Nationality Act.² In the instant case respondent did not file an application for suspension of deportation until April 12, 1955, which was after the effective date of the Immigration and Nationality Act.

The case, *Miyagi v. Brownell*, *supra*, is clearly distinguishable from the instant case, in that *Mi-*

¹In the case, *In Re Raimondi*, 126 F. Supp. 390, at page 393, the court referred to the unreported decision (*Romero-Garcia v. Barber*) of United States District Judge Louis E. Goodman (among other decisions), in reaching the conclusion that the term or phrase "date of enactment" used in the Immigration and Nationality Act, meant the date on which the Act took effect—December 24, 1952.

²Section 405(a) Immigration and Nationality Act insofar as vital here reads: * * *

An application for suspension of deportation under Sec. 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection. * * *

Dated: May 1, 1956.

/s/ O. D. HAMLIN,
United States District Judge.

[Endoresd]: Filed May 1, 1956.

United States District Court for the Northern
District of California, Southern Division

MINUTE ORDER—MAY 9, 1956

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Wednesday, the 9th day of May, in the year of our Lord one thousand nine hundred and fifty-six.

Present: The Honorable O. D. Hamlin.

[Title of Cause.]

This matter came on for hearing this date on order to show cause. Ordered after hearing, return of the defendant filed, memorandum of defendant to be filed by May 10, 1956, and petitioner granted 5 days thereafter to file reply. Case continued to May 16, 1956, for submission.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

The respondent Bruce G. Barber, District Director, United States Immigration and Naturalization Service, San Francisco, California, by and through his undersigned attorneys, Lloyd M. Burke, United States Attorney for the Northern District of California, and William B. Spohn, Assistant United States Attorney, makes this return on the order of May 1, 1956, to show cause why a writ of habeas corpus should not be issued herein:

I.

The respondent admits that the petitioner Lal Singh is a citizen of India and asserts that any residence by the petitioner in the United States has been and is unlawful for the reason that the petitioner entered the United States without inspection in January, 1927, in violation of applicable law and regulations, in that he had previously been deported in February, 1926, for having unlawfully entered the United States in July, 1925.

II.

The respondent denies that the petitioner is presently detained by the respondent, but asserts that the petitioner was ordered to surrender for deportation on May 1, 1956, pursuant to formal demand dated April 20, 1956, and that the petitioner did surrender accordingly on May 1, 1956; that thereafter, upon the filing of the petition herein,

the petitioner was released under bond pending the disposition of said petition. The respondent further asserts that the warrant of deportation of the petitioner was based upon the conclusion reached after due hearing and review that at the time of the petitioner's last entry into the United States, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by the applicable law and regulations.

III.

The respondent admits that expulsion proceedings under a warrant of arrest previously issued were held February 8, 1954, and continued to April 12, 1955, when the petitioner submitted an application for suspension of deportation.

IV.

The respondent admits that the Exhibit "A" annexed to and made a part of the petition is a true copy of the decision and order of the special inquiry officer as alleged in the petition. The Court will note that said decision contains, on page 3, the findings of fact upon which the special inquiry officer concluded that the petitioner was subject to deportation, but ordered that the petitioner be granted voluntary departure in lieu of deportation. Also, that it was further ordered that if petitioner failed to take advantage of the privilege of voluntary departure, said order would be withdrawn and the petitioner would be deported on the charge contained in the warrant of arrest dated July 7, 1950—

namely, that "The Immigration Act of May 26, 1924, in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder."

V.

The respondent admits that the Exhibit "B" annexed to and made a part of the petition is a true copy of the petitioner's appeal dated November 8, 1955, from the order of the special inquiry officer dated October 7, 1955, and of the decision of the Board of Immigration Appeals dated December 2, 1955. The Court will note that in the first paragraph on page one of the petitioner's appeal, it was conceded that he is subject to deportation on the charge contained in the warrant of arrest as set forth in paragraph IV hereinabove.

VI.

The respondent admits that on December 21, 1955, the petitioner filed a motion with the Board of Immigration Appeals to reconsider its aforesaid decision of December 2, 1955, in which motion certain court decisions were cited in the petitioner's behalf. The respondent further admits that on March 2, 1956, the Board of Immigration Appeals, after fully considering the effect of said court decisions and their asserted applicability to the petitioner's status, denied the motion to reconsider. The respondent further admits that the copies of said motion and decision annexed to and made a part of

the petition as Exhibit "C" are true and correct copies.

VII.

The respondent admits that the Board of Immigration Appeals found in its aforesaid decision of March 2, 1956, that the petitioner's application for suspension of deportation must be considered under Section 244 of the Immigration and Nationality Act of 1952 (8 USC 1254), and that the petitioner failed to meet the requirements of said section. The respondent denies that in said decision the Board of Immigration Appeals denied the petitioner's application for suspension of deportation, but asserts that the Board therein denied the petitioner's motion to reconsider its order of December 2, 1955, as stated in paragraph VI hereinabove. The Court will note that in said order of December 2, 1955, the Board of Immigration Appeals concluded as follows:

"We concur fully in the reasons set forth by the special inquiry officer as his basis for holding that the respondent has not established that he was of good moral character and therefore, basically eligible for consideration for suspension of deportation. The evidence fully supports that the respondent admits making false statements under oath in connection with his application for registry on November 29, 1949. These statements considered with other factors relating to the respondent's status as an immigrant in the United States, we find, preclude a

finding of good moral character. In view thereof, the appeal will be dismissed.

“Order: It is ordered that the appeal be and the same is hereby dismissed.”

VIII.

The respondent denies that the decision of the Board of Immigration Appeals is erroneous for the reasons stated in paragraph VIII of the petition or for any other reasons. This denial applies to both the December 2, 1955, and March 2, 1956, decisions of the Board of Immigration Appeals, although neither is specified in the petition.

IX.

The respondent denies that the petitioner has been denied a fair hearing and denied due process of law for the reasons stated in paragraph IX of the petition or for any other reasons.

X.

The respondent has no knowledge or information of any prior petition for writ of habeas corpus concerning the detention and restraint complained of in the present petition.

XI.

The respondent admits that the petitioner has been at liberty under bond since the issuance of the warrant of arrest on July 7, 1950, as stated in paragraph IV hereinabove, and that since that date the petitioner has appeared before the Immigration authorities whenever so required.

Wherefore, the respondent prays that the petition for writ of habeas corpus be dismissed and the order so show cause discharged.

Dated: May 9, 1956.

LLOYD H. BURKE,
United States Attorney,

By /s/ WILLIAM B. SPOHN,
Assistant United States Attorney, Attorneys for
Respondent.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

ORDER

On March 15, 1956, the respondent ordered the deportation of the petitioner. The petitioner was permitted to depart voluntarily, but his application for suspension of deportation was denied. He filed this petition for habeas corpus, admitting he was deportable, but alleging that his application for suspension of deportation was erroneously denied.

The petitioner first entered this country in 1925. Under the name of Garma Singh he was convicted later in the same year of a violation of the Passport Act of 1918. He was deported, but entered the country again in 1927 unlawfully and without any inspection. In 1935 he stated under oath to an examining officer of the Immigration and Naturalization Service that he had entered this country only

once. In May, 1938, a warrant of arrest pursuant to deportation proceedings against the petitioner was issued, but it was returned unserved. Thereafter, in 1949, he made an application for Registry of an Alien in which he stated he had entered this country only once, in 1923, and had never been deported. This application was denied when it was learned that he had been deported before. It was also found that he was not a person of good moral character because of his "repeated false statements concerning his arrest and deportation." Thereafter, in 1950, a warrant of arrest in a deportation proceeding was issued charging petitioner with being in this country in violation of the Immigration Act of 1924. The first matter relating to this 1950 warrant of arrest was a hearing before a Special Inquiry Officer on February 8, 1954. The petitioner made an application for Suspension under § 244 of the Immigration and Nationality Act of 1952, and a second hearing in the deportation proceedings was held on April 12, 1955. He admitted four arrests for drunken driving. The Special Inquiry Officer found that he was deportable and ordered his deportation; he also found that he was not of good moral and character for seven years before the application for suspension, and therefore denied the application. 8 U.S.C.A. § 1254(a)(1). But he did find that he was of good moral character for the last five years, and thus granted him the privilege of voluntary departure. 8 U.S.C.A. §§ 1254(e), 1101(f). Conceding that he was deportable, the petitioner appealed to the

Board of Immigration Appeals. The Board affirmed the order of the Officer and stated:

“We concur fully in the reasons set forth by the special inquiry officer as his basis for holding that the respondent has not established that he was of good moral character and therefore, basically ineligible for consideration for suspension of deportation. The evidence fully supports that the respondent admits making false statements under oath in connection with his application for registry on November 29, 1949. These statements considered with other factors relating to the respondent's status as an immigrant in the United States, we find, preclude a finding of good moral character. In view thereof, the appeal will be dismissed.” Board of Immigration Appeals, A-2549749, Dec. 2, 1955.

Thereafter, the petitioner moved the Board to reconsider on the ground that his eligibility should be determined under the 1917 Act as amended, 8 U.S.C.A. (1946 Ed.) § 155(c). The Board denied the motion, saying:

“Accordingly, we hold that respondent's application for suspension of deportation made April 12, 1955, must be considered under current law. The requirements have not been met for relief under that provision of law.” Board of Immigration Appeals, A-2549749, March 2, 1956.

Thus, it seems clear that the Board determined statutory eligibility for suspension of deportation of the petitioner solely under the 1952 Act, and refused to apply the provisions of the prior Act.

Counsel for the petitioner contends that by virtue of the Savings Clause in the 1952 Act, § 405(a), 8 U.S.C.A. § 1101, note, he is entitled to have his eligibility for suspension considered under the prior Act, and that the refusal of the Board to do so constitutes an error of law which requires the Court to grant this writ. In support of his contention, he cites: *United States v. Menasche*, 348 U.S. 528, *Aure v. U. S.*, 9 Cir., 225 F. 2d 88, *Zacharias v. Shaughnessy*, 221 F. 2d 578, *Ex Parte Robles-Rubio*, 119 F. Supp. 610, *Miyagi v. Brownell*, D.C. Cir., 227 F. 2d 33, *Romero-Garcia v. Barber*, #34639, D.C. N.D. Cal.

In the *Aure* case, *supra*, this Circuit held that no affirmative action need be taken by one claiming the benefits of the savings clause in order to preserve those benefits under that clause, and the test was whether the benefit claimed was a substantive right or a mere procedural one. In the *Zacharias* case, *supra*, the Second Circuit held that in a deportation proceeding which began with a warrant of arrest served after 1952, eligibility for voluntary departure should be determined under the prior law, since the application for voluntary departure related back to an application for an immigrant visa filed by the petitioner's wife some three months before the effective date of the 1952 Act. In *Miyagi*, *supra*, the first hearing in *Miyagi's* deportation proceedings was held in 1945; in 1950 he moved to reconsider, and the warrant and order of deportation were set aside and the hearing reopened. In

1953, Miyagi applied for suspension of deportation and it was heard and denied under the 1952 Act. The District of Columbia Circuit held that he was entitled to have his application for suspension determined under the 1917 Act because the savings clause applied to the reopened proceedings. These cases establish that no affirmative action is needed to come within the savings clause and that eligibility for suspension of deportation is a matter which comes within the purview of the savings clause, and which is saved if something relating to the deportation proceeding occurred prior to 1952. In the case at bar, the only thing relating to this deportation proceeding that occurred prior to 1952 is the service of the warrant of arrest. In the Zacharias case, it was an application by the wife for an immigration visa. In the Miyagi case it was the warrant of arrest and a hearing. These cases indicate that a warrant of arrest prior to 1952 is sufficient to entitle the deportee to have his eligibility for suspension of deportation determined under the 1917 Act.

Solely because the Board apparently limited its consideration of eligibility to the provisions of the 1952 Act, it would appear that the petitioner is entitled to a new hearing in order that the Board may apply the standards of the 1917 Act in the consideration of his application for suspension of deportation. It must be pointed out, however, that even if it is determined that the petitioner is eligible for suspension of deportation, the grant of that suspension is a matter committed to the unfettered discre-

tion of the Attorney General, and the exercise of that discretion is not reviewable in the courts save for an abuse of that discretion. *Jay v. Boyd*, U. S. Supreme Court, June 11, 1956, *Barreiro v. Brownell*, 9 Cir., 215 F.2d 584, *Melachrinis v. Brownell*, D.C. Cir., 230 F.2d 42, *Kaloudis v. Shaughnessy*, 2 Cir., 180 F.2d 489. On the basis of the record before us, the Attorney General might very well conclude that suspension of deportation should be denied to the petitioner in light of his background and history.

For the foregoing reasons, the petitioner is permitted a new hearing on his application for suspension of deportation, in which his eligibility is to be determined under the 1917 Act. The writ of habeas corpus staying his deportation until that hearing is had will be granted.

Dated: June 20, 1956.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the respondent Bruce G. Barber hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order filed herein on June 21, 1956, in favor of the above petitioner.

Dated: August 17, 1956.

LLYOD H. BURKE,

United States Attorney,

By /s/ CHARLES ELMER COLLETT,

Assistant United States At-
torney.

[Endorsed]: Filed August 17, 1956.

In the United States District Court for the Northern
District of California, Southern Division

No. 35435

In the Matter of:

The Petition of Lal Singh, for a Writ of Habeas
Corpus.

**ORDER ISSUING WRIT OF HABEAS CORPUS
AND DISCHARGING PETITIONER**

The Court, having heretofore considered the petition for writ of habeas corpus filed herein and the return of the respondent to the order to show cause, and the matter having been heretofore fully presented and heard on said petition and return, and this Court having on June 21, 1956, entered its opinion and order that the writ of habeas corpus issue staying the petitioner's deportation until a new hearing is had on his application for suspension of deportation, in which hearing his eligibility is to be determined under the 1917 Act, now, therefore,

It Is Hereby Ordered that the writ of habeas corpus be and hereby is granted and issued and that the said petitioner be and hereby is discharged from custody of said respondent until such time as said respondent grants the petitioner a new hearing on his application for suspension of deportation in which his eligibility is determined under the Immigration Act of February 5, 1917.

Dated: Sept. 4, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form Sept. 4, 1956.

/s/ CHARLES ELMER COLLETT,
Asst. U. S. Atty.

/s/ MILTON T. SIMMONS,
Attorney for Petitioner.

[Endorsed]: Filed September 4, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That the respondent Bruce G. Barber hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Issuing Writ of Habeas Corpus and Discharging Petitioner, dated and filed on September 4, 1956, in the above-entitled case.

Dated: September 10, 1956.

LLYOD H. BURKE,
United States Attorney,

By /s/ CHARLES ELMER COLLETT,
Assistant United States At-
torney.

[Endorsed]: Filed September 11, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Petition for Writ of Habeas Corpus.

Order to Show Cause.

Minute Order of Proceedings, May 9, 1956.

Return to Order to Show Cause.

Order Granting New Hearing.

Notice of Appeal.

Order Issuing Writ of Habeas Corpus and Dis-
charging Petitioner.

Notice of Appeal.

Appellant's Designation of Record on Appeal.

Certified Record of Immigration and Naturalization Service, Introduced at Hearing on May 9, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 26th day of September, 1956.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

EXCERPT FORM DOCKET ENTRIES

1956

May 1—Filed petition for habeas corpus.

May 1—Filed order to show cause, returnable May 9, 1956. (Judge Hamlin.)

May 9—Hearing on order to show cause. Return to defendant filed, memo. of deft. to be filed by May 10, 1956; petitioner 5 days to file reply and case continued to May 16, 1956, for submission. (Judge Hamlin.)

* * *

June 21—Filed return of respondent to order to show cause.

* * *

1956

June 21—Filed order of Court. Petitioner permitted new hearing on application for suspension of deportation and writ of habeas corpus staying deportation until said hearing will be granted. (Judge Hamlin.)

* * *

Aug. 17—Filed notice of appeal by defendant.

* * *

Sept. 4—Filed order issuing writ of habeas corpus and discharging petitioner from custody.

* * *

Sept. 11—Filed notice of appeal by defendant.

Sept. 20—Filed appellant's designation of record on appeal.

[Endorsed]: No. 15300. United States Court of Appeals for the Ninth Circuit. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellant, vs. Lal Singh, Appellee. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed: September 26, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 15300

BRUCE G. BARBER, District Director, Immigration
and Naturalization Service, San Francisco,

Appellant,

vs.

LAL SINGH,

Appellee.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

The appellant, by his undersigned attorneys, presents the following statement of points on which he intends to rely on appeal in this cause:

I.

The District Court erred in holding that no affirmative action is required to bring a person within the savings clause of the Immigration and Naturalization Act of 1952 (Sec. 405(a), 8 U.S.C.A. Sec. 1101, note).

II.

The District Court erred in holding that eligibility for suspension of deportation is a matter within the purview of said savings clause and "which is saved if something relating to the deportation proceeding occurred prior to 1952."

III.

The District Court erred in holding that a warrant of arrest prior to 1952 is sufficient to entitle the deportee to have his eligibility for suspension of deportation determined under the Immigration Act of 1917 (8 U.S.C. 155(c)(2)).

IV.

The District Court erred in holding that because the Board of Immigration Appeals "apparently limited its consideration of eligibility to the provisions of the 1952 Act, it would appear that the petitioner is entitled to a new hearing in order that the Board may apply the standards of the 1917 Act in the consideration of his application for suspension of deportation."

V.

The District Court erred in permitting the petitioner a new hearing on his application for suspension of deportation, in which hearing his eligibility is to be determined under said 1917 Act.

VI.

The District Court erred in ordering that a writ of habeas corpus be granted staying the petitioner's deportation until such hearing is had.

VII.

The District Court erred in granting a writ of habeas corpus and discharging the petitioner from custody until such time as the appellant herein grants the petitioner a new hearing on his applica-

tion for suspension of deportation in which his eligibility is to be determined under the said Immigration Act of 1917.

Dated: November 1, 1956.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

By /s/ CHARLES ELMER COLLETT,
Assistant United States Attorney, Attorneys for the
Appellant.

Affidavit of Mail attached.

[Endorsed]: Filed November 1, 1956.



No. 15,300

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,
San Francisco,

Appellant,

VS.

LAL SINGH,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California.**

BRIEF OF APPELLANT.

LLOYD H. BURKE,
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CHARLES ELMER COLLETT,
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San Francisco 1, California,

Attorneys for Appellant.

FILE

MAR 25 1957



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No. 15,300

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,
San Francisco,

Appellant,

VS.

LAL SINGH,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California.**

BRIEF OF APPELLANT.

JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court was invoked under Title 28 U.S.C. Sec. 2241 by the filing of a petition for writ of habeas corpus. The petition alleged that "petitioner is detained by the respondent under an order that he be deported from the United States. . . ."

The District Court issued an order to show cause pursuant to Title 28 U.S.C. Sec. 2243. Appellant thereafter filed a return to the order to show cause. Issues of law only were presented by the return. Ap-

pellant was not required to produce appellee, and no traverse or denial of any facts set forth in the return was made. The issues of the case were joined by the petition and the return to the order to show cause.

The jurisdiction of this Court arises under Title 28 U.S.C. Section 2253, which provides in part as follows:

“In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the circuit where the proceeding is had. . . .”

Two notices of appeal were timely filed, one from the order of June 21, 1956 and the other from the order of September 4, 1956 issuing the writ of habeas corpus and discharging petitioner.

STATEMENT OF THE CASE.

The order of the District Court of June 21, 1956 recites the facts. The appellee first entered the United States in 1925 under the name of Garma Singh. He was convicted later in the same year of a violation of the Passport Act of 1918. He was deported, but entered the United States again in 1927 unlawfully and without any inspection. In 1935 he stated under oath to an examining officer of the Immigration and Naturalization Service that he had entered this country only once. In May 1938, a warrant of arrest pursuant to deportation proceedings against the appellee was issued, but it was returned unserved. Thereafter, in 1949, he made an application for registry as an alien,

in which he stated he had entered the United States only once in 1923, and had never been deported. This application was denied when it was learned that he had been previously deported. Appellee was also found to be a person not of good moral character because of his "repeated false statements concerning his arrest and deportation." In 1950 a warrant of arrest in a deportation proceeding was issued charging appellee with being in the United States in violation of the Immigration Act of 1924. The first matter relating to this 1950 warrant of arrest was a hearing before a Special Inquiry Officer on February 8, 1954. The appellee made an application for suspension of deportation under Sec. 244 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1254) and a second hearing was held on April 12, 1955. Appellee admitted four arrests for drunken driving. The Special Inquiry Officer found that he was deportable and ordered his deportation. The application for suspension of deportation was denied on the finding that appellee was a person not of good moral character for seven years before the application for suspension (8 U.S.C. 1254(a) (1)). The Special Inquiry Officer did find appellee to have been of good moral character within the meaning of the statutory requirements for the privilege of voluntary departure (8 U.S.C. 1254(e) and 1101(f)) and such privilege was granted.

The order of the Special Inquiry Officer, October 7, 1955, was appealed to the Board of Immigration Appeals. The appeal was dismissed by said Board on November 2, 1955. On December 21, 1955 appellee filed

a motion with the Board of Immigration Appeals to reconsider on the ground that the application for suspension of deportation should be governed by Sec. 19(c)(2) of the Immigration Act of 1917 (8 U.S.C. 155(c)(2)). The Board of Immigration Appeals denied the motion to reconsider on March 2, 1956.

Appellee was ordered to surrender for deportation on May 1, 1956. Appellee did surrender on May 1, 1956 and thereafter filed the petition herein. Appellee was then released on bond pending the disposition of the petition.

QUESTION PRESENTED.

Appellant has stated seven points on appeal. The seven points are resolved into the following question: Does Section 405(a), the "Savings Clause" of the 1952 Act, save to appellee the applicability of Section 19(c) of the 1917 Act as governing his application for suspension of deportation made in 1954 under Section 244(a) of the 1952 Act.

STATUTES INVOLVED.

Section 19(c), Immigration Act of 1917 (8 U.S.C. 155(c)):

"In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, The Attorney General may (1) permit such alien to depart the United States to any

country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act * * *."

Section 244(a)(1), Immigration and Nationality Act (8 U.S.C. 1254(a)(1)):

"(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who——

(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all such period he was and is a person of good moral character; and is a person whose

deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; * * *”

Section 405(a), Immigration and Nationality Act (8 U.S.C. 1101, footnote):

“(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended,

or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Section 101(f), Immigration and Nationality Act (8 U.S.C. 1101(f)):

"(f) For the purposes of this Act——

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was——

(1) a habitual drunkard;

(2) one who during such period has committed adultery;

(3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212(a) of this Act; or paragraphs (9), (10), and (23) of section 212(a), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and

eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of the crime of murder.

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

There was no statutory equivalent of Section 101(f) in the United States Code prior to December 24, 1952.

SUMMARY OF ARGUMENT.

Suspension of deportation is a matter of grace not a matter of right. The conditions or limitations of the discretionary authority, and the eligibility for the relief are determined by the statute in effect at the time the application is filed. A pending application is dependent upon a savings clause in a new act to save the applicability of a repealed act.

Appellee's application was made under Sec. 244(a) of the 1952 Act. The application was filed after the 1952 Act became *effective*. The court below erroneously held that Sec. 405(a), the savings clause of the 1952 Act, saved to appellee the provision of Sec. 19(c) of the 1917 Act as governing the eligibility of appellee.

ARGUMENT.

1. ON DECEMBER 24, 1952 APPELLEE WAS NOT IN ANY "STATUS" OR "CONDITION" NOR DID HE HAVE ANY "RIGHT IN PROCESS OF ACQUISITION" UNDER SECTION 19(c) OF THE 1917 ACT WHICH WAS SAVED TO HIM BY SECTION 405(a) OF THE 1952 ACT.

Appellee is a deportable alien. The action initiated herein does not challenge the proceedings of the Immigration and Naturalization Service insofar as appellee was determined to be deportable on the charges lodged against him. Appellee by his petition sought the judgment of the court below declaring him to be eligible for discretionary relief of suspension of deportation under the provision of Section 19(c) of the 1917 Act as governing his application for such relief filed under Section 244(a) of the 1952 Act.

The legal process invoked by appellee is that of habeas corpus, although an action for a declaratory judgment would appear to be the proper method of seeking the court's judgment. *Ceballos v. Shaughnessy* decided by the Supreme Court March 11, 1957, 25 L.W. 4187. The detention upon which the petition is founded is lawful in that appellee is a deportable alien. It would not appear proper for the court to release appellee from the custody of appellant but rather upon a determination of eligibility to remand for further proceedings involving the exercise of discretion.

The distinction was clearly made in *McGrath v. Kristensen*, 340 U.S. 162, at page 169:

"... Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when

in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies. Under Section 19(c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a proscribed status by this administrative ruling of ineligibility. Since the administrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and the immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of the federal courts, 28 U.S.C. 1331, and the terms of the Declaratory Judgment Act, 28 U.S.C. 2201."

However, in *Accardi v. Shaughnessy*, 347 U.S. 260, the Supreme Court considered the question of failure to exercise discretion arising by way of a petition for writ of habeas corpus. Petitioner was admittedly deportable. The writ was denied by the District Court. The Court of Appeals affirmed, 206 F.2d 897, and the Supreme Court granted certiorari (346 U.S. 884). In its opinion the Supreme Court thought the petition charged the "Attorney General with precisely what the regulation forbid him to do". The court said at page 268:

"If petitioner can prove the allegation, he should receive a new hearing before the Board without

the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.”

The lower court was reversed and *Accardi* given the opportunity to prove “the allegation” in the District Court. After a full hearing in the District Court, the court found that the Board members “reached their individual and collective decision on the merits, free from any dictation or suggestion. . . .” The Court of Appeals reversed (219 F.2d 77). The Supreme Court reversed the Court of Appeals and affirmed the District Court. *Shaughnessy v. Accardi*, 349 U.S. 280.

Had the District Court found that the Board members reached their decision as a result of dictation, the case would have been remanded to the Board for further hearing. However, *Accardi's* status as a deportable alien would have been unaffected.

The District Court's order herein has granted the writ and discharged appellee from the custody of ap-

pellant, until a new hearing on his application for suspension of deportation is granted. Appellee's status as a deportable alien remains undisturbed.

The grant of the discretionary relief of suspension of deportation is not a matter of right "but rather is in all cases a matter of grace." *Jay v. Boyd*, 351 U.S. 345, 354 (222 F.2d 820; 224 F.2d 957, aff.).

From page 354 of *Jay v. Boyd*, supra, the following is quoted:

"Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. *Accardi v. Shaughnessy*, 347 U.S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of a criminal sentence, it 'comes as an act of grace,' *Escoe v. Zerbst*, 295 U.S. 490, 492, and 'cannot be demanded as a right' *Berman v. United States*, 302 U.S. 211, 213."

In Note 16 following the citation of *Berman v. United States*, Judge Learned Hand in *United States ex rel Kaloudis v. Shaughnessy*, 180 F. 2d 489, 491, is quoted as follows:

"The power of the Attorney General to suspend deportation is a dispensing power like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict."

The matter of the applicability of the Savings Clause, Section 405, has been under consideration by the courts in a number of cases, particularly *United States v. Menasche*, 348 U.S. 528; *Aure v. United States*, 9th Cir. 225 F. 2d 88; *Zacharias v. Shaugh-*

nessy, 2d Cir. 211 F. 2d 578, and *Miyagi v. Brownell*, District of Columbia Circuit, 227 F. 2d 33.

In the *Menasche* case the Supreme Court resolved a difference of view between the Second Circuit in the case of *United States ex rel Aberasturi v. Cain*, 147 F. 2d 449, and the District of Columbia in *Bertoldi v. McGrath*, 178 F. 2d 977.

At page 534 this difference is stated as follows:

“A second and more significant conflict concerned inchoate rights to derivative citizenship, which when proper conditions were met, required only the passage of time to ripen into full citizenship. When the 1940 Act changed certain of the conditions in this process the question arose whether those whose time had begun to run before the 1940 Act took effect were to be governed by the old law or the new. The Second Circuit held that the new law applied, because Section 347(a) of the 1940 Act did not extend to a ‘mere condition unattended by any affirmative action.’ *United States ex rel Aberasturi v. Cain*, 147 F. 2d 449. The Court of Appeals for the District of Columbia disagreed, construing the broad language of Section 347(a) as covering ‘rights particularly accruing’ and ‘rights in process of acquisition.’ *Bertoldi v. McGrath*, 178 F. 2d 977. This latter conflict must have been paramount in the minds of Congress when the first subsection of the Savings Clause was broadened. . . . We conclude that Congress intended to adopt the principle of the Bertoldi case that ‘the new Act should take effect prospectively.’ ”

Against the contention of the Government in *Menasche*, the Supreme Court held, page 535:

“The change in the section was designed to extend the Savings Clause already broadly drawn and embodies, we believe, congressional acceptance of the principle that the status quo was to continue even as to rights not fully matured.”

In *Aure v. United States*, 225 F. 2d 88, this Court said:

“Clearly, it is the teaching of the *Menasche* case, and we are satisfied it was the intent of Congress, that the Savings Clause is not limited to cases involving affirmative action and those concerning derivative citizenship, but its preservation feature should be extended to all substantive rights existing at the time the statute creating the rights was repealed. The real test was whether the ‘right’ which the alien seeks to have preserved by the Savings Clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies. See *Hallowell v. Common*, 239 U.S. 506, *De La Rama Steamship Company v. United States*, 344 U.S. 386, *Matsuo v. Dulles*, F. Supp. (D.C. Calif. June 1955)”.

In the *Menasche* and *Aure* cases the court was concerned with the right of an alien to become a naturalized citizen of the United States. *Aure* had acquired the right under the 1940 Act to be naturalized without being admitted to the United States for permanent residence by taking the affirmative action of filing a petition for naturalization. *Menasche*, an alien, had filed his declaration of intention to become an American citizen before the effective date of the 1952 Act. His petition for naturalization was filed after the

effective date of the new Act. The Supreme Court, in *Menasche*, held that “respondent’s inchoate right to citizenship is protected by Section 405(a) and is not defeated by any implications stemming from Section 405(b),” and affirmed the District Court and the Court of Appeals in their conclusion that Section 405(a) preserved *Menasche’s* inchoate rights under the prior law.

In *Aure*, a petition for naturalization had not been filed prior to the repeal of the 1952 Act. As quoted from the decision above this Court held that the “right” which *Aure* sought to have preserved by the Savings Clause is a substantive right as distinguished from a procedural remedy. It is clear in *Aure* and *Menasche* that what the alien sought to have preserved by the Savings Clause was a “right.”

Referring again to the cases of *Jay v. Boyd*, supra, and *Kaloudis v. Shaughnessy*, 180 F. 2d 489 (2 C.A.) and to the Ninth Circuit case, *Wolf v. Boyd*, 238 F. 2d 249, suspension of deportation is not a matter of right but a matter of grace. The exercise of discretionary authority is invoked by an application for suspension filed by an eligible applicant.

The two Court of Appeals cases cited by the court below are *Zacharias v. Shaughnessy*, 221 F. 2d 578, a 2nd Circuit Court of Appeals decision, and *Miyagi v. Brownell*, 227 F. 2d 33, a District of Columbia Court of Appeals decision.

In *Zacharias*, a concededly deportable alien seaman sought the privilege of voluntary departure under 8 U.S.C. 1254(e). The crucial question was the appli-

cability of 8 U.S.C. 1101(f)(2) with regard to his eligibility. Prior to the effective date of the 1952 Act, Mrs. *Zacharias* had filed the preliminary papers for an immigration visa for her husband so that he might legally reenter the country from Canada. This application was approved by the New York office of the Immigration and Naturalization Service on January 5, 1953 and forwarded to Montreal. No further action was taken until October 6, 1954 when the application was denied on the grounds that *Zacharias* was ineligible for a visa under 8 U.S.C. 1182(a)(28). In the interim between the filing of the visa application and its denial, *Zacharias* requested preexamination and voluntary departure on April 10, 1953. However, deportation proceedings were initiated. *Zacharias* was found statutorily ineligible for voluntary departure under the 1952 Act. Such determination was affirmed by the Board of Immigration Appeals which rejected his contention that the 1952 Act did not apply to his case. The Second Circuit Court of Appeals held, page 581:

“We conclude that the preliminary application for the visa in September 1952 was sufficient to bring *Zacharias* within Section 405(a). This application was the first step in his effort to attain legal status in this country.”

From this ruling and from the deliberations of the court leading thereto, it is seen that in order to hold that *Zacharias* had a “status, condition, right in process of acquisition, act, thing or matter then done or existing”, the court had to construe the act of his wife

in filing the preliminary papers for an immigration visa as the first step or the affirmative action required to invoke the exercise of the discretionary function. The necessary conclusion which flows from the decision is that absent the filing of the preliminary papers, the relief sought by *Zacharias* under the Savings Clause must have been denied.

In *Miyagi*, the deportation proceedings on the ground of illegal entry were begun in 1945. In 1950 *Miyagi* filed a motion for reconsideration. The Board of Immigration Appeals in consequence of the motion withdrew the original order and warrant of deportation, and ordered the hearing "reopened for the reception of such application for relief from deportation as may be made and for further appropriate proceedings in connection therewith." The application for suspension of deportation was not formally made until 1953, after the 1952 Act had taken effect. The District of Columbia Court of Appeals held:

"We think the Savings Clause applies to the proceedings thus reopened."

In other words, the court construed the motion to reopen for the purpose of making application for relief from deportation as a sufficient affirmative act to give rise to a proceeding within Section 405(a), the Savings Clause.

From the foregoing cases, the area within which the present case must be decided is defined. As in *Menasche* and *Aure*, the appellee here is not seeking to save a "right in process of acquisition" whether

or no affirmative action to implement said right has been taken, he seeks what is a “matter of grace” for which an application must be made. *Jay, Kaloudis, Wolf* (supra). The Savings Clause is invoked to preserve requirements for eligibility contained in the statute which was repealed and under which application was not made. In *Zacharias* and *Miyagi* the court construed the filing of the preliminary papers for an immigration visa in the one case and the motion for reconsideration and to reopen to make application for relief from deportation in the other case, as “affirmative” acts giving rise to a “status, condition, right in process of acquisition, act, thing, or matter then done or existing” or “proceeding”, which could be “saved” by the Savings Clause. The last sentence of Section 405(a) states:

“An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under Section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.”

It is the contention of the appellant that whether or not a deportation proceeding has been initiated by the issuing of a warrant of arrest, an applicant for discretionary relief of suspension of deportation must have taken affirmative action by filing an application for such relief under the statute then in effect. If the application was made under Section 19(c) of the 1917 Act, the Savings Clause, Section 405(a), saves to the

applicant the provisions of the 1917 Act in the consideration of said application. No affirmative action was taken by the appellee in this case prior to 1954. The application filed was under Section 244(a) of the 1952 Act. Section 19(c) was no longer in effect, having been repealed. The Board of Immigration Appeals has properly ruled that eligibility for the relief sought must be determined under the provisions of the 1952 Act.

The recent decision of the Court of Appeals for the District of Columbia in *Foradis v. Brownell*, No. 13216, decided January 17, 1957, F. 2d further supports appellant's contention. *Foradis* had filed an application for suspension on October 16, 1952, which was subsequent to the date of *enactment*, June 27, 1952, but prior to the *effective* date of the 1952 Act, December 24, 1952. Section 405(a) of the 1952 Act . . . refers to an application which is pending on the date of *enactment* of this Act. The court concluded, page 3 of the slip sheet:

“This statutory declaration that an application for suspension of deportation, pending on the date of enactment of the 1952 Act, shall be regarded as a proceeding within the meaning of subsection 405(a) is not a specific provision that such an application filed after that date but prior to the effective date of the Act shall not also be regarded as such a proceeding under the sweeping terms of the preceding provisions of the same subsection.”

In Section 405(a), preceding the use of the term “enactment” reference is twice made to “at the time

this Act shall take effect”, and in one instance the term “effective” is used. The use of “enactment” in the last sentence would seem to have been deliberate, but the court construed it to mean “effective.” In any event an application must have been filed before the “effective date” of the Act. Otherwise there is nothing to be regarded as a proceeding to be saved.

2. AFFIRMATIVE ACTION WAS REQUIRED BY APPELLEE UNDER SECTION 19(c) OF THE 1917 ACT PRIOR TO DECEMBER 24, 1952.

In *Hyun v. Landon*, 219 F. 2d 404 (9th Cir.), affirmed in the Supreme Court by an equally divided court, 350 U.S. 990, this Court said:

“It is well settled that the power of Congress to regulate the deportation of aliens is plenary and only in case of extreme abuse will the courts intervene, as stated in *Carlson v. Landon*, 1952, 342 U.S. 524, 536 . . . ‘it is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country is deemed hurtful.’ See also: *Harisiades v. Shaughnessy*, 1952, 342 U.S. 580, *Shaughnessy v. United States ex rel, Mezei*, 1953, 345 U.S. 206, *Bugajewitz v. Adams*, 1913, 228 U.S. 585, 591, *Ng Fung Ho v. White*, 1922, 259 U.S. 276, 280, *Ocon v. Landon*, Dec. 1954, 9 Cir., 218 F. 2d 320, (*Ocon v. Landon*, Sept. 1956, 9 Cir., 237 F. 2d 177), *Galvan v. Press*, 9 Cir., 1953, 201 F. 2d 302, (347 U.S. 522), *Carlson v. Landon*, 9 Cir., 1950, 186 F. 2d 183 (342 U.S. 524).”

The existence of the discretionary authority as expressive of the "act of grace" is dependent upon the act of Congress creating it. When Congress repeals the act, the "grace" ceases. A deportable alien who seeks "grace" may make application only within the statutory authority existing at the time the application is made.

By Sec. 403(a) of the 1952 Act, Congress repealed Sec. 19(c) of the 1917 Act. No authority thereafter remained in the Attorney General under 19(c) other than as saved by the last sentence of Sec. 405(a) of the 1952 Act, which specifically refers to an application under Sec. 19.

Appellee herein made no application under 19(c) of the 1917 Act. He made application under 244(a) of the 1952 Act in 1954, long after the 1952 Act went into effect. An appeal taken from the ruling of the Special Inquiry Officer was dismissed in November 1955. In December 1955 appellee filed a motion to reopen to reconsider on the ground that the application for suspension made under 244(a) should be governed by Sec. 19(c) of the 1917 Act. The motion to reconsider was denied.

At the time appellee made his application for suspension the only authority for such relief was Section 244(a) of the 1952 Act.

The case of *Wolf v. Boyd* of this Court, 238 F. 2d 249, presents a similar time sequence. The proceedings were commenced before 1952. The original hearing started in 1949. Petitioner *Wolf* pursued judicial

review to denial of certiorari in the Supreme Court in 1955, 348 U.S. 951. A motion was then filed with the Board of Immigration Appeals to reopen the hearing to permit the respondent to file an application for suspension of deportation under Section 244(a)(5) of the 1952 Act. The motion was denied. The Board of Immigration Appeals held, page 253:

“It is well settled that a rehearing on an administrative proceeding is not a matter of right but lies within the discretion of the agency making the order. *United States v. Pierce Auto Freight Lines, Inc.*, 1946, 327 U.S. 515, 535, 66 S.Ct. 687, 90 L. Ed. 821, *Interstate Commerce Comm., v. Jersey City*, 1944, 322 U.S. 503, 514, 64 S. Ct. 1129, 88 L. Ed 1420.”

This court at page 254 said:

“Clearly petitioner is not entitled to a hearing as a matter of right, if the Board has exercised its discretion.”

Beginning at page 254, Judge Learned Hand's opinion in *Kaloudis v. Shaughnessy*, 180 F. 2d 489, 490, 491 is quoted practically in its entirety.

The Second Circuit Court of Appeals decision in *United States ex rel Hintopoulos v. Shaughnessy*, 233 F. 2d 705, cert. granted, 352 U.S. 819, discloses an interesting facet of the discretionary function. *Hintopoulos*, an admittedly deportable alien, made application for suspension of deportation under Section 19(c) of the 1917 Act before December 24, 1952. He was found eligible under 19(c) but the Board of Immigration Appeals in the exercise of its discretion

denied the application. In the formulation of its discretion, the Board took into account, among other factors, its concept of congressional policy as manifested by Section 244(a) of the 1952 Act. At page 709 the court said:

“In other words, under Section 405 of the 1952 Act the appellants were entitled to have the application disposed of under the 1940 Act. And that right was fully accorded them. They were found eligible for suspension under the 1940 Act and the suspension was denied under the discretionary power created by the 1940 Act. The reference to Section 244(a) of the 1952 Act showed only that the Board considered its exercise of discretion to be consonant with the policy of that Act, not that the scope of its discretionary power was restricted by that Act.”

Judge Frank dissented. The Supreme Court granted certiorari, 352 U.S. 819, and appellant is informed and believes the case was argued in the Supreme Court during the week of March 4, 1957. 25 L.W. 3248.

It is appellant's contention that although the Savings Clause may be broad, the “grace” of the sovereign with regard to suspension of deportation is contained in the statute in existence at the time an application therefor is made. A repealed statute affords no comfort to an applicant unless Congress has expressly saved its benefit. The only aliens who were saved possible benefits under Section 19(c) by Section 405(a) were those who had made application for suspension prior to the 24th day of December, the effective date of the 1952 Act. This appellee did not do.

CONCLUSION.

It is respectfully submitted that the court below erred in permitting the appellee a new hearing on his application for suspension of deportation in which his eligibility is to be determined under the 1917 Act, in granting a writ of habeas corpus staying petitioner's deportation until such hearing is had, and discharging appellee from custody of appellant.

The order of the court below should be reversed, the writ denied, the petition dismissed and appellee remanded to the custody of appellant.

Dated, March 7, 1957.

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CHARLES ELMER COLLETT,

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Attorneys for Appellant.

No. 15,300

IN THE
United States Court of Appeals
For the Ninth Circuit

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service, San Francisco,

Appellant,

vs.

LAL SINGH,

Appellee.

APPELLEE'S BRIEF.

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FILED

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APPELLEE'S BRIEF.

INTRODUCTORY STATEMENT.

The facts of this case are not in dispute. They are fully discussed in the order of the District Court, dated June 21, 1956. (Tr. 50.)

The appellee is an applicant for suspension of deportation. It is conceded that he is subject to deportation and the sole issue before this Court is whether his eligibility for suspension of deportation should be determined under the provisions of the Immigration Act of 1917 (8 U.S.C. 155(c)) or the Immigration Act of 1952 (8 U.S.C. Sec. 1254 (a)(1)). To resolve the issue, it is necessary to determine whether or not the

District Court was correct in holding that under the provisions of the "Savings Clause" of the 1952 Act (8 U.S.C. 1101 footnote) the appellee's eligibility for suspension of deportation was to be considered under the 1917 Act.

STATUTES AND REGULATIONS INVOLVED.

Section 19(c), Immigration Act of 1917 (Repealed)
(8 U.S.C. 155(c)) :

"In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act * * *."

Section 244(a)(1), 1952 Immigration and Nationality Act. (8 U.S.C. 1254(a)(1)) :

"(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of

an alien lawfully admitted for permanent residence, in the case of an alien who——

(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; * * *

Section 405 (a), 1952 Immigration and Nationality Act (8 U.S.C. 1101, footnote):

“(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit,

action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as emended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.”

Section 101(f) 1952 Immigration and Nationality Act (8 U.S.C. 1101(f)):

“(f) For the purposes of this Act——

“No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was——

- (1) a habitual drunkard;
- (2) one who during such period has committed adultery;

(3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212(a) of this Act; or paragraphs (9), (10), and (23) of section 212(a), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of the crime of murder.

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

Section 156 (g), Title 8, Code of Federal Regulations, Supplement to 1940 edition (repealed), published in 6 Fed. Reg. 68:

"150.6 * * *

"(g) *Application for departure in lieu of deportation or for suspension of deportation.* At any time during the hearing the alien may give

notice that he wishes to apply * * * for suspension of deportation under the provisions of section 19 (c) of the Immigration Act of 1917, as amended.”

Section 150.10, Title 8, Code of Federal Regulations, Supplement to 1940 edition (repealed), published in 7 Fed. Reg. 10515:

“150.10 *Special procedure; application by an alien prior to arrest for suspension of deportation*—(a) *Who may apply.* Any alien who believes himself to be subject to deportation and against whom deportation proceedings have not been instituted by the issuance of a warrant of arrest, as provided in Sec. 150.3 or 150.11(a)
* * *

SUMMARY OF ARGUMENT.

Appellant sums up his argument by stating that suspension of deportation is a matter of grace; that eligibility for such relief is to be determined by the statute in effect when the application is filed; that a pending application is dependent upon a “Savings Clause” in a new act to save the applicability of a repealed act and that the Court below erred in holding that the “Savings Clause” saved to the appellee the provisions of the 1917 Act, as governing his eligibility for suspension of deportation.

The exercise of discretion in granting suspension of deportation may be a matter of grace after eligibility has been determined, but appellee contends that the determination of eligibility for the exercise of such dis-

cretion is a matter of law; that such determination is made during, and as a part of, a deportation proceeding, and is therefore governed by the law which applies to the deportation proceeding itself; that the deportation proceeding (including the application for suspension of deportation) in this case was saved by the "Savings Clause" and that therefore the decision of the Court below is correct and should be sustained.

ARGUMENT.

I.

DETERMINATION OF ELIGIBILITY FOR SUSPENSION OF DEPORTATION IS NOT A MATTER OF GRACE.

Appellant fails to distinguish between the determination of eligibility for suspension of deportation and the exercise of the discretion of granting or denying such relief after eligibility has been determined. If an application for suspension of deportation is made during the course of a deportation procedure, the Special Inquiry Officer first determines whether the applicant meets the statutory requirements for such relief. These requirements are spelled out under both the 1917 Act and the present law. Under both acts, good moral character is an important requirement, but under the 1917 Act only five years of good moral character need be proven; whereas, under the 1952 Act, the requirement is seven years. If the Special Inquiry Officer determines that the applicant meets the statutory requirements for suspension of deportation, he then proceeds to determine whether, as a matter of discretion,

the application should be granted. If the applicant fails to meet the statutory requirements, the Special Inquiry Officer is powerless to exercise the discretion, no matter how strong the equities or how deserving the case may be. Consequently, when an applicant is found ineligible for suspension of deportation, a question of law is involved, not a matter of grace, and the decision of the Special Inquiry Officer is reviewable for error.

In the case at bar, the Special Inquiry Officer and the Board of Immigration Appeals held that the appellee failed to meet the statutory requirements for suspension of deportation. (Tr. 7 at P. 11; Tr. 39 at P. 43.) No exercise of discretion was involved. The Court below properly inquired into the case to determine whether the correct law was applied in determining eligibility for suspension of deportation. The decision of the District Court made it abundantly clear that exercise of discretion was not at issue and that the Service was free to exercise its discretion as it saw fit, if the correct law was applied. (Tr. 50 at P. 54.) We submit that the exercise of discretion is not at issue in this appeal.

II.

THE SAVINGS CLAUSE OF THE 1952 ACT APPLIES TO THE APPELLEE'S APPLICATION FOR SUSPENSION OF DEPORTATION AND THE 1917 ACT IS CONTINUED IN EFFECT AS TO HIS APPLICATION.

Appellant opens the first section of his argument by stating that appellee was not in any "status" or "con-

dition," nor did he have any "right in the process of acquisition" under the 1917 Act which was saved to him by the Savings Clause. Obviously, appellant has not considered the broad scope of the Savings Clause, which includes much more than a "status," "condition," or "right in process of acquisition." We quote herewith the specific portion of the Savings Clause which does apply to the case at bar, deleting all surplusage:

Sec. 405(a): "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to * * * affect any * * * proceedings, * * * done or existing, at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes * * * repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

A warrant of arrest was issued against the appellee in 1950, thus instituting a deportation proceeding. That proceeding was saved by the Savings Clause. The Court below quite properly held that no affirmative action was needed to bring the appellee's case within the Savings Clause and that his eligibility for suspension of deportation was a matter which was saved if something relating to the deportation occurred prior to 1952. In other words, once a proceeding is started under the prior law, the entire proceeding is saved.

In the second part of his argument, the appellant states that the appellee failed to take any affirmative action to apply for suspension of deportation until after the effective date of the 1952 Act. And appellant

also argues that the last sentence of the Savings Clause, which reads:

“An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under Section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.”

requires that an application for suspension be filed prior to the date of enactment in order to be saved, whether or not the deportation proceeding is saved. We cannot agree. We contend that the quoted sentence does not specifically limit the preceding part of the Savings Clause, but in fact expands its scope. *Foradis v. Brownell*, No. 13216, decided January 17, 1957, 242 F.2d 218, cited by appellant tends to support our interpretation.

In order for the Court to understand the intent of Congress in placing this last sentence in the Savings Clause, it is necessary for the Court to understand the situation which existed as to suspension of deportation cases at the time the legislation was enacted. Counsel for appellee was employed by the Immigration Service at the time as a Deportation Hearing Officer, and supplies the following information from his personal knowledge of the situation which then existed.

Suspension of deportation was first made a part of the Immigration laws in 1940, by addition of subsection (c) to Section 19 of the Act of 1917. (8 U.S.C. 155 (c).) The regulations supplementing this new provi-

sion of law provided that an alien under deportation proceedings might, *at any time during the deportation hearing*, make application for suspension of deportation. (8 C.F.R. 150.6(g)).

About December 1942, the regulations were amended to provide a "short form" suspension of deportation procedure. (8 C.F.R. 150.10.) Under this regulation, an alien who believed he was in the United States unlawfully and that he was eligible for suspension of deportation, and against whom *no warrant of arrest had been issued*, might apply for suspension of deportation. Upon receipt of such an application (and when available personnel permitted), an officer of the Service would advise the applicant of the necessary documents, conduct an investigation, obtain a warrant of arrest, conduct a brief examination, and if eligibility was established, recommend to the Commissioner that suspension of deportation be granted. If there was any doubt as to eligibility, the "short form" procedure was terminated, and *regular deportation* proceedings were instituted, and during the course of the hearing, the alien could apply for suspension of deportation in the same manner as any other alien under deportation proceedings.

It must be remembered that under the "short form" an alien could apply *only if no warrant had been issued*. If a warrant had been issued, he applied *only during the deportation hearing*.

After World War II, the number of applications under the "short form" procedure increased greatly. After the 1948 amendment to Section 19(c) broadened

the scope of eligibility, the Immigration Service was deluged with applications. It was not uncommon for a three- or four-year backlog to exist in some of the larger offices, such as San Francisco. These applications were set aside while available personnel were assigned to more important tasks, such as the deportation of criminals and subversives. During the last two years prior to the 1952 Act, an effort was made to clear up this arrearage of cases, but new applications continued to be filed in great numbers and when the new law was enacted, there were thousands of applications in which no warrant of arrest had been issued, nor had any other action been taken. It is our sincere belief, that Congress added the last sentence of the Savings Clause to save all such applications on file on the date of enactment, even though no proceedings had been instituted by the issuance of a warrant of arrest. Our view is consistent with the language of the last sentence which provides that an application for suspension of deportation which is pending on the date of enactment *shall be regarded as a proceeding* within the meaning of this subsection. In other words, if a timely application was filed but no proceeding was instituted, the application is regarded as a proceeding, but if a proceeding has been instituted by issuance of a warrant of arrest, the proceeding is saved and suspension of deportation may be applied for during the course of the hearing.

The appellee was not eligible to apply for suspension under the "short form" after 1950 because a warrant of arrest had been issued against him. He could,

however, apply for suspension of deportation *during the course of the deportation hearing*. In 1950, the Supreme Court held that deportation hearings must conform to the Administrative Procedures Act. (*Wong Yang Sung v. McGrath*, 339 U.S. 33.) This decision resulted in the rehearing of thousands of deportation hearings and priorities were established, whereby cases involving criminal, subversives, immoral, and similar aliens were heard first and those in which suspension of deportation seemed likely were taken last. Some cases were not heard for several years after issuance of the warrant of arrest. Hearing in the case of the appellee was not held until 1954. Consequently, he had no opportunity to apply for suspension of deportation prior to the 1952 Act even though his deportation proceeding was instituted in 1950. Must the appellee be prejudiced by reason of the Service's delay, over which he had no control? We think not. He made his application during the course of a deportation proceeding which was existing at the time the 1952 Act took effect and was entitled to have his application considered as to eligibility under the provisions of the 1917 Act. In *Miyagi v. Brownell*, 227 Fed. 2d 33, the alien was first accorded a deportation hearing in 1945, motion to reopen was granted in 1950, and in 1953, he applied for suspension of deportation during the reopened hearing. The District of Columbia Circuit held that the 1917 Act applied to the reopened proceeding and to the application for suspension of deportation. (See also *Romero-Garcia v. Barber*, No. 34639 U. S. District Court, Northern District of California, Southern Division

(not reported).) As the Supreme Court stated in *United States v. Menasche*, 348 U. S. 528:

“The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, *manifests a well established Congressional policy not to strip aliens of advantages gained under prior laws.* The consistent broadening of the savings provision, particularly in its general terminology, *intended to apply to matters both within and without the specific contemplation of Congress.*” (Italics added.)

As stated above, the 1952 Act required seven years of good moral character; whereas, the 1917 Act requires only five years. The eligibility of the appellee depends upon the section which applies because the Special Inquiry Officer and the Board of Immigration Appeals found that he had been a person of good moral character for five years, but that he could not show seven years of good moral character, because of certain misrepresentations made to Immigration officers more than five years prior to the hearing but within the seven-year period. If the 1952 Act applies, the appellee was ineligible for suspension of deportation and the Service could not exercise its discretion to grant or deny the application as a matter of grace. If, on the other hand, the 1917 Act applies, the Service having already found that the appellee met the statutory requirement of five years of good moral character, he would be found eligible for suspension of deportation and the exercise of discretion would be appropriate. Whether the appellee would be granted or

denied suspension as a matter of discretion, we, of course, do not know, but we do know that such relief was granted under the 1917 Act in a case on all fours with that of appellee (*Matter of U—*, 2 I. & N. Dec. 830).

CONCLUSION.

It is respectfully submitted that decision of the Court below should be upheld because:

1. A deportation proceeding was instituted against the appellee in 1950.
2. As to that proceeding, the 1917 Act applies by reason of the Savings Clause of the 1952 Act.
3. The application for suspension of deportation in 1954 was a part of the deportation proceeding and therefore eligibility for such relief must be determined under the 1917 Act.

Dated, San Francisco, California,

April 26, 1957.

MILTON T. SIMMONS,

Attorney for Appellee.

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No. 15302

**United States
Court of Appeals**
for the Ninth Circuit

MILTON C. CHARLES,

Appellant,

vs.

WILLIAM N. BOWIE, JR., as Trustee in Bank-
ruptcy of American Aeronautics Corporation,
Bankrupt,

Appellee.

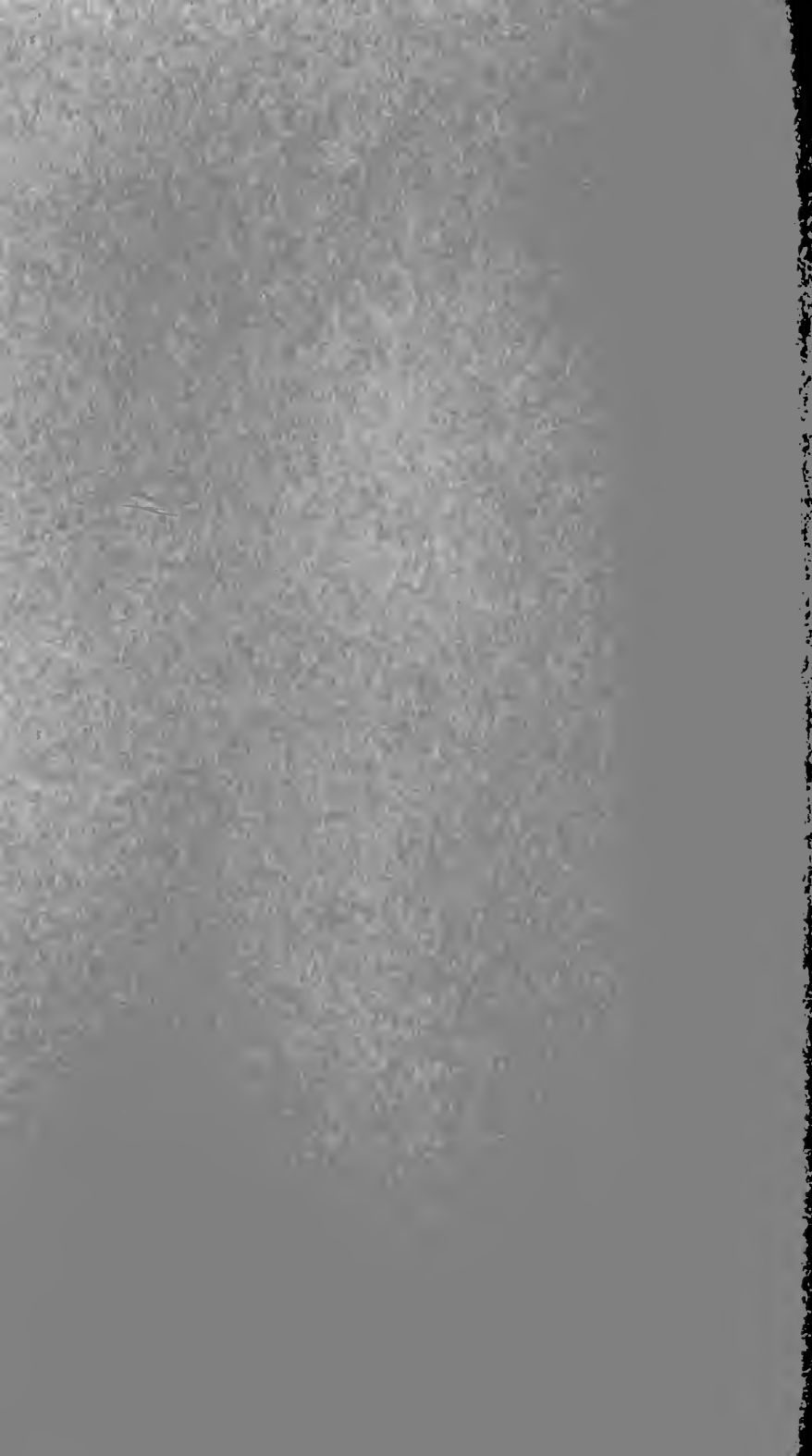
Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

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PAUL P. O'BRIEN, CLERK



No. 15302

**United States
Court of Appeals**
for the Ninth Circuit

MILTON C. CHARLES,

Appellant,

VS.

WILLIAM N. BOWIE, JR., as Trustee in Bank-
ruptcy of American Aeronautics Corporation,
Bankrupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Witnesses:

Charles, Milton C.

—direct 23

Strube, Gordon D.

—direct19, 30



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Witnesses:

Charles, Milton C.

—direct 23

Strube, Gordon D.

—direct19, 30



In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 68155-PH

In the Matter of

AMERICAN AERONAUTICS CORPORATION,
a Corporation,

Bankrupt.

PETITION FOR ORDER
TO SHOW CAUSE

To the Honorable David B. Head, Referee in Bank-
ruptcy:

The petition of Milton C. Charles respectfully
shows:

1. That he is a Certified Public Accountant, duly
licensed to practice under the laws of the State of
California;

2. That on or about February 15, 1955, the
above-named bankrupt, in writing, and for a pres-
ent and valuable consideration, assigned to peti-
tioner the sum of \$4,000 from a Federal Income Tax
refund due from the Director of Internal Revenue;

3. That said Federal Income Tax refund has
been received by the Trustee in Bankruptcy of the
above-named bankrupt, William N. Bowie, Jr., in
an amount of approximately \$9,600.00.

4. That said Trustee in Bankruptcy has refused
and still refuses to pay from said sum the amount of
petitioner's assignment.

Wherefore, petitioner prays for an order directing the within named Trustee in Bankruptcy to appear and show cause, if any he has, why an order should not be made and entered herein [2*] decreeing that the said Trustee in Bankruptcy pay to petitioner the sum of \$4,000.00 from the proceeds of the Federal Income Tax refund in the possession of said Trustee; and for such other and further relief as to the Court seems just.

/s/ MILTON C. CHARLES,
Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed February 3, 1956. [3]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading and filing of the verified petition of Milton C. Charles, and good cause appearing therefor, and no adverse interest appearing,

It Is Ordered that William N. Bowie, Jr., Trustee in Bankruptcy of the above-entitled bankrupt, appear before the undersigned at his courtroom, 340 Federal Building, Temple and Spring Streets, Los Angeles, California, on Thursday, February 9, 1956, at the hour of 10:00 a.m., then and there to show cause, if any he has, why an order should not be

made and entered herein in accordance with the prayer of the said petition.

It Is Further Ordered that a copy of said petition and of this order to show cause be served upon said Trustee in Bankruptcy by United States Mail not less than five days prior to the hearing thereon.

Dated: February 3, 1956.

/s/ HOWARD V. CALVERLY,
Referee in Bankruptcy.

Affidavit of service by mail attached.

[Endorsed]: Filed February 3, 1956. [5]

In the United States District Court, Southern
District of California, Central Division

No. 68155-PH

In the Matter of

AMERICAN AERONAUTICS CORPORATION,
a Corporation,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER RE ORDER TO SHOW
CAUSE OF MILTON C. CHARLES

The Order to Show Cause heretofore made and issued in this proceeding on February 3, 1956, upon the petition of Milton C. Charles came on regularly for hearing on the 9th day of February, 1956, at

10:00 a.m. of said day before Honorable David B. Head, Referee in Bankruptcy, in his courtroom, 304 Federal Building, Temple and Spring Streets, Los Angeles 12, California, at which time petitioner Milton C. Charles appeared by his attorneys Marvin Gross and Anthony T. Carsola by Marvin Gross, Esq., and William N. Bowie, Jr., as Trustee in Bankruptcy herein, appeared by his attorney Haskell H. Grodberg, Esq., at which time evidence both oral and documentary was received, and the Court having heard the testimony and having examined the proofs offered, and the cause having been duly submitted to the Court for decision, and the Court being fully advised in the premises, the Court now makes its Findings of Fact as follows:

Findings of Fact

I.

It is true that petitioner Milton C. Charles is [7] a Certified Public Accountant duly licensed to practice as such under the laws of the State of California.

II.

It is true that on the 15th day of February, 1955, the above-named bankrupt made an assignment in writing to petitioner Milton C. Charles of a portion of a Federal Income Tax refund to be processed through the Office of the Director of Internal Revenue; that said portion was in an amount which would reasonably compensate said petitioner for personal services to be performed by him in connection

with doing the necessary accounting for and preparing and filing the Income Tax return required in order to obtain the said claim for refund.

III.

It is true that the said Milton C. Charles did and performed said accounting services and prepared and filed the said return. It is true that the said Milton C. Charles was required to and did work for a period of three days in performing said services. It is true that the reasonable value of said services was and is the sum of \$100.00 per day, to wit, the total sum of \$300.00.

IV.

It is true that since the execution and delivery of said assignment and since the performance of said work and labor that said Federal Income Tax refund has been received by William N. Bowie, Jr., as Trustee in Bankruptcy of the above-named bankrupt in an amount sufficient to pay the said sum of \$300.00 to said Milton C. Charles, in full. It is true that no part thereof has been paid to said petitioner to date hereof.

Conclusions of Law

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That William N. Bowie, Jr., as Trustee in Bankruptcy of [8] the above-named bankrupt should be ordered to pay forthwith to petitioner Milton C. Charles the sum of \$300.00 from the proceeds de-

rived by said Trustee from the aforementioned Income Tax refund.

Order

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged, and Decreed:

That William N. Bowie, Jr., as Trustee in Bankruptcy of the above-named bankrupt pay to Milton C. Charles the sum of \$300.00.

Dated: February 27, 1956.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

Receipt of copy acknowledge.

Received February 20, 1956.

[Endorsed]: Filed February 27, 1956. [9]

[Title of District Court and Cause.]

PETITION TO REVIEW REFEREE'S ORDER

To the Honorable David B. Head, Referee in Bankruptcy:

The petition of Milton C. Charles respectfully shows:

That your petitioner is a person aggrieved by an order of a Referee, and is a creditor of the Bankrupt in the above-entitled matter;

That on February 9, 1956, an Order to Show Cause was heard, pursuant to the petition of your

petitioner herein, to determine the validity of a \$4,000.00 written assignment from the Bankrupt to your petitioner; that said claim was based upon labor and services performed by the petitioner as a Certified Public Accountant;

That after said hearing, before the Honorable David B. Head, Referee in Bankruptcy, Findings of Fact, Conclusions of Law and Order were entered on February 28, 1956, by the said Referee, summarily denying petitioner's claim, except in the amount of \$300.00;

That said Order was and is erroneous in the following [11] particulars:

1. Said Order is not supported by the evidence adduced at said hearing;
2. Said Order fails to consider the clear and undisputed intent of the parties to said assignment;
3. Said Order fails to construe said assignment in accordance with the undisputed intent of the parties thereto;
4. Said Order fails to interpret said assignment against the Bankrupt, the maker thereof, and in favor of your petitioner;
5. Said Order specifically contradicts said assignment, substituting the amount of \$300.00 in the place and stead of \$4,000.00, contrary to the undisputed intent of both parties to said assignment;
6. Said Order wholly fails to consider the circumstances surrounding said assignment, and the interpretation placed thereon by both parties;

7. Paragraph III of said Findings of Fact is erroneous in the following particulars:

a. There is no evidence to support the finding that your petitioner worked for a period of three days in performing said services; rather, the undisputed testimony shows that your petitioner worked a period in excess of forty (40) days in performing said services.

b. There is no evidence to support the finding that the reasonable value of the services performed was in the amount of \$300.00.

8. That said Findings of Fact are not supported by the evidence;

9. That said Conclusions of Law are erroneous in that the Trustee should be ordered to pay to your petitioner the [12] sum of \$4,000.00 rather than the sum of \$300.00.

Wherefore, your petitioner, being aggrieved by said Order, prays that the same may be reviewed by a Judge of this Court as provided by the Bankruptcy Act.

MARVIN GROSS &
ANTHONY T. CARSOLA,

By /s/ MARVIN GROSS,
Attorneys for Petitioner.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed March 1, 1956. [13]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Peirson M. Hall, Judge of the
United States District Court, Southern District
of California, Central Division:

I, David B. Head, a Referee in Bankruptcy of
this court, do certify as follows:

Milton C. Charles petitioned this court for an
order to show cause why the trustee should not be
ordered to turn over to the petitioner the sum of
\$4,000.00 received by the trustee as a refund from
the Director of Internal Revenue.

The petitioner's claim is based on a document
signed by the bankrupt which reads as follows:

“Because of the fact that this corporation ap-
pears to be entitled to a substantial Income Tax
refund and has no monies with which to pay
your fees to do the necessary accounting and
prepare and file the return in order to obtain
it, it is our wish to make some arrangement
with you for payment of your services in
connection with claim for refund. From esti-
mates [15] received from you, it would appear
that this may take as much as forty hours or
more in work to be performed by you, and you
may consider this an assignment of whatever
refund we receive as a result of your services to
the extent of \$4,000.00 for such services.”

Testimony was taken which tended to show that the petitioner had performed some 40 days of work on the preparation of the application for tax refund but that only 3 days of this work was performed after the assignment was executed.

I pointed out to the parties that I could give effect to the assignment only to the extent of the value of the services rendered after the date of the assignment. Counsel for the petitioner seemed to take the position that the assignment should be interpreted to give it retroactive effect. I pointed out to counsel that the assignment read prospectively and not retroactively and that, if this interpretation were given it, violence to the terms of the assignment would be done. However, I suggested that his remedy was to petition for reformation of the document, so that the true intention of the parties would be expressed and the rights of any third parties could be determined. He did not ask for leave to amend. Findings and conclusions were entered and a petition for review has been filed.

The question presented is whether or not the assignment in question can be interpreted so as to reform it under the present pleadings?

I don't believe that Rule 8 (f) R.C.P. can be stretched to cover this situation.

I certify the following documents from the file:

- (1) Petition for Order to Show Cause;
- (2) Order to Show Cause;

- (3) Exhibit 1; [16]
- (4) Findings of Fact and Conclusions of Law;
- (5) Petition for Review.

Dated this 6th day of March, 1956.

Respectfully submitted,

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed March 6, 1956. [17]

[Title of District Court and Cause.]

REFEREE'S SUPPLEMENTARY
CERTIFICATE ON REVIEW

To the Honorable Peirson M. Hall, Judge of the
United States District Court, Southern District
of California, Central Division:

I, David B. Head, a Referee in Bankruptcy of
this court, do further certify as follows:

- (1) Reporter's Transcript of Proceedings.

Dated this 8th day of March, 1956.

Respectfully submitted,

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed March 8, 1956. [18]

United States District Court, Southern District
of California, Central Division

No. 68,155—PH

In the Matter of
AMERICAN AERONAUTICS CORPORATION,
Bankrupt.

ORDER

The Order of the Referee on review by Petition
of Milton C. Charles is affirmed.

Dated: Los Angeles, California, this 18th day of
June, 1956.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed June 18, 1956.

Entered June 19, 1956. [19]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Milton C. Charles, petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the Referee in Bankruptcy, David B. Head, entered February 27, 1956, and from the Order on Petition for Review by the Honorable Peirson M. Hall, Judge, United States District Court, entered on June 19, 1956.

Dated: July 12, 1956.

MARVIN GROSS &
ANTHONY T. CAROLA,

By /s/ MARVIN GROSS,
Attorneys for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed July 13, 1956. [20]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now petitioner-appellant Milton C. Charles and files the following Statement of Points on Appeal:

1. The Order of the Referee on the Order to Show Cause is contrary to law and fact;
2. There is no evidence to support said Order.

Dated: July 16, 1956.

MARVIN GROSS &
ANTHONY T. CAROLA,

By /s/ MARVIN GROSS.

Affidavit of service by mail attached.

[Endorsed]: Filed July 16, 1956. [25]

In the District Court of the United States, Southern
District of California, Central Division
In Bankruptcy No. 68,155—PH

In the Matter of:

AMERICAN AERONAUTICS,

Bankrupt.

HEARING RE: ORDER TO SHOW CAUSE,
MILTON C. CHARLES VS. WILLIAM N.
BOWIE

The following is a stenographic transcript of the proceedings in the above-entitled cause, which came on for hearing before the Honorable David B. Head, United States Referee in Bankruptcy, at his courtroom, 340 Federal Building, Los Angeles, California, at the hour of 10:00 o'clock, on Thursday, February 9, 1956.

Before: Honorable David B. Head, Referee in
Bankruptcy.

Appearances of Counsel:

For the Trustee:

HASKELL GRODBERG, ESQ.

For the Petitioner:

MARVIN GROSS, ESQ.

Thursday, February 9, 1956—10:00 A.M.

The Referee: This is the matter of Charles against Bowie. Who is appearing for the petitioner?

Mr. Gross: Marvin Gross, your Honor.

Mr. Grodberg: If the Court please, before commencing with this, Mr. Welch of Latham and Wat-

kins is present representing Grand Central Aircraft Company. I think that I should make some explanation of his presence and of the matter which I had discussed with him. Mr. Bowie does not happen to be here.

The Referee: Yesterday I received in the mail a copy of about a four-page letter from Mr. Bowie. Are you agreed upon this stipulation, the two stipulations which you are talking about?

Mr. Grodberg: As far as I know, that is so, your Honor. I was under the impression that we would have the second of these stipulations here today. I spoke to Mr. Bowie and he said he would get in touch with Mr. Youngblood.

I called Mr. Youngblood again yesterday and he again stated that he was in agreement, as I set forth in that letter, but he stated that on Friday last he had mailed the Stipulation No. 2, which had been in his possession, back to Mr. Bowie. [2*]

Now, in a subsequent conversation I had with Mr. Bowie relating to this Charles matter, he told me that he would be here today, and I assumed that he would be here and bring that stipulation along, too.

I advised Mr. Welch that in view of the fact that Mr. Youngblood wanted Stipulation No. 3 filed at the time that Stipulation No. 2 was filed and in view of the fact that we wanted Mr. Welch's Stipulation No. 2 filed when No. 3 was filed, we would all file them here together.

The Referee: Will you bring them in together at the same time whenever you can get them in?

Mr. Grodberg: I felt that I should explain that so Mr. Welch will understand I did what I could.

Mr. Welch: I do understand and I further understand that counsel on both sides have not only accepted, but have signed this stipulation and it is just a matter of its production at this time.

The Referee: All right. When you get both stipulations, just simply file them in the Clerk's office.

Mr. Grodberg: Thank you.

The Referee: I will approve the stipulations.

Mr. Welch: Thank you, your Honor.

The Referee: All right. In the Charles matter, what is your position here, Mr. Gross?

Mr. Gross: Well, your Honor, I have gone [3] through the file which you have before you and it seems there was a case quite similar factually and legally to the one we have today.

Mr. Charles, the petitioner, has put in some 40 days of accounting time. He had put it in to straighten out the books and prepare the books for American Aeronautics Corporation. He had put in the greater portion of his time prior to February 15, 1955, at which time a discussion was had between Mr. Charles and American Aeronautics regarding payment of his fees. He had not received anything up to date and he was, of course, attempting to make arrangements for reimbursement.

On that date, the corporation assigned to Mr. Charles for his past services and for his promise to continue and finish the job that he had undertaken to straighten out the books to the extent of \$4,000, a

claim for refund which was expected to return from the Department of Internal Revenue very shortly.

Mr. Charles did finish up the work and complete the job that he had undertaken, and now, we understand that claim has been received and is in the possession of the trustee in bankruptcy and he has refused to pay over \$4,000.

The Referee: The assignment was in what form?

Mr. Gross: It is in written form, your Honor.

The Referee: Yes. [4]

Mr. Grodberg: The Trustee advised me that he had not been presented this in written form.

The Referee: You may go ahead with your proof, Mr. Gross.

Mr. Gross: Mr. Strube, will you take the stand?

GORDON D. STRUBE

called on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gross:

Q. Mr. Strube, you were president of American Aeronautics Corporation, were you not?

A. Yes.

Q. For how long a period were you president?

A. Approximately six years.

Q. Directing your attention to sometime in 1954, did you approach Mr. Milton C. Charles relative to some accounting work for your firm?

A. Yes, I did.

Q. Do you know approximately when that was?

(Testimony of Gordon D. Strube.)

A. About the first part of July of 1954.

Q. As a result of the discussion which you had with him, did he undertake to perform certain work for the firm?

A. Yes, he did. [5]

Q. Generally, what was the nature of the work to be done, do you know?

A. Yes, in a general way I do. The first phase of his work amounted to straightening up the books and records of the corporation which had been left unattended for some period of time and then after setting up the books, to perform certain audits and other general work in connection with anticipated litigation that the corporation was going to enter into.

Q. Now, pursuant to your discussion, Mr. Charles did enter into the performance of his duties, did he not?

A. Yes, he did.

Q. Sometime in early 1955, did you have a discussion with Mr. Charles relative to the payment of any fees for his work?

A. Yes, we had a conversation.

Q. Prior to that conversation, had you paid Mr. Charles anything at all, any consideration at all, for any work that he had done up to that time?

A. No, he had never received any consideration.

Q. As a result of that conversation which you had, Mr. Strube—first, I show you a document which appears to be signed by you and ask you if you recognize it.

A. Yes, I do.

Q. Did you prepare the document? [6]

A. Yes.

(Testimony of Gordon D. Strube.)

Q. Is that your signature on it? A. Yes.

Q. Now, was that document prepared as a result of the conversation you had with Mr. Charles relative to the payment of his fees?

A. Yes. I wrote this very soon after the conversation.

Q. Did you deliver that document personally to Mr. Charles?

A. Yes, I delivered it to his office.

Q. Has Mr. Charles, to your knowledge, ever been paid anything whatsoever for any work he has done on the books for American Aeronautics?

A. I know he had not been paid.

Q. Did Mr. Charles do any more work on the books or for American Aeronautics after you delivered this document to him? A. Yes, he did.

Mr. Gross: I would like to introduce this, your Honor, as Petitioner's first exhibit.

The Referee: It will be marked Petitioner's 1.

PETITIONER'S EXHIBIT No. 1

American Aeronautics Corporation
3104 West Vanowen Street, Burbank, California
Rockwell 9-1296
TWX BRB 7127

15 February, 1955

Mr. Milton C. Charles
8907 Wilshire Boulevard
Beverly Hills, California.

(Testimony of Gordon D. Strube.)

Dear Mr. Charles:

Because of the fact that this corporation appears to be entitled to a substantial Income Tax refund and has no monies with which to pay your fees to do the necessary accounting and prepare and file the return in order to obtain it, it is our wish to make some arrangement with you for payment of your services in connection with claim for refund. From estimates received from you, it would appear that this may take as much as forty hours or more in work to be performed by you, and you may consider this an assignment of whatever refund we receive as a result of your services to the extent of \$4,000.00 for such services.

Yours very truly,

AMERICAN AERONAUTICS
CORPORATION,

/s/ GORDON D. STRUBE,
President.

GDS:gjs

[Endorsed]: Filed February 8, 1956.

Mr. Gross: I have no more questions of this witness, your Honor.

Mr. Grodberg: No questions.

The Referee: All right. You may step down, Mr. Strube. [7]

MILTON C. CHARLES

the Petitioner herein, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gross:

Q. Will you state your full name, please?

A. Milton C. Charles.

Q. What is your business or occupation?

A. Certified public accountant.

Q. Are you licensed to practice in the State of California? A. I am.

Q. How long have you been licensed?

A. I have been licensed since June, approximately June, 1944.

Q. Just briefly, will you give us a touch of your background and experience?

The Referee: He is a C. P. A., so that is not necessary.

Mr. Gross: Very well, your Honor.

Q. Now, sometime in 1954, Mr. Charles, did you have a discussion or were you approached by Mr. Gordon Strube relative to performing some accounting work for American Aeronautics Corporation?

A. I was.

Q. Do you recall approximately when that was? [8]

A. It was either in the latter part of June or the early part of July. I would say before the 2nd or 3rd of July, either somewhere between the 28th of June and the 2nd of July.

Q. 1954? A. 1954, yes.

(Testimony of Milton C. Charles.)

Q. Pursuant to that discussion, did you enter upon the performance of any duties?

A. I did.

Q. On behalf of American Aeronautics Corporation? A. Yes, I did.

Q. Generally, what were you concerned with doing at that time?

A. Well, when I went into the American Aeronautics, I first had a discussion with Mr. Strube. He asked me whether I would take care of the books and records for the company and I said I would be happy to, but I would have to take a look at the books and see what they were all about.

I spent some time just examining the records to see the condition of them. I found that nothing had been done on the books for quite some time. They didn't tell much of a picture, either businesswise or accountingwise, and I told Mr. Strube in order to put those records in good shape it would require a lot of work.

Q. Was there any discussion as to fees at that time? [9]

A. Well, Mr. Strube asked me if I had an idea what it would cost him. I told him it was very difficult for me to determine at that time because I had no idea how many days it would take, although I knew it would require a great deal of time, and I said that about the most reasonable way I could handle it would be to do the job and then determine how much time was spent on it and work on some sort of a per diem basis.

(Testimony of Milton C. Charles.)

Q. Now, sometime in the early part of 1955 after you had performed some of these services for the American Aeronautics Corporation, did you have a discussion with Mr. Strube relative to payment for your services?

A. As a matter of fact, it seems to me it was in the latter part of 1954. I believe it was sometime in December. It may have been shortly before the end of the year or shortly thereafter, and I had said, "Mr. Strube, you realize fully—you have seen me here practically every day. You realize fully that I have put in a great deal of time and now approximately six months have elapsed and I haven't received one dime for my fee," and I said, "Of course, I don't pay my rent on that basis and I think some consideration should be made."

Mr. Gross: May I have Petitioner's 1, your Honor?

The Referee: Yes.

Q. (By Mr. Gross): Now, after that discussion with [10] Mr. Strube, were you delivered by him personally this document which is Petitioner's Exhibit 1?

A. You will have to forgive me a minute while I put on my glasses.

Yes, that is it. That was a document that was delivered by Mr. Strube personally.

Q. Was it delivered on or about the date it bears, February 15, 1955?

A. Yes, sir, as close as I can recall, that is the approximate date.

Q. After you had received that document, did

(Testimony of Milton C. Charles.)

you perform any further services on the books of American Aeronautics Corporation?

A. Yes. I had told Mr. Strube after he had made this arrangement with me, or before then even, I said, "If you do what you propose to do, I would be very happy to continue, and even if the services and time will amount to a greater sum than I estimated, I will bring it through to a conclusion so that the books will be in such shape that you will have your closing at the end of the year and prepare any statements or anything else you may need."

Q. All in all, Mr. Charles, how many days did you put in working on the books of American Aeronautics? A. I put in some 40-odd days.

Q. When was the last day approximately, if you recall, that you put in? [11]

A. Well, I continued there practically shortly before the petition, but I had put in the year of 1954 alone approximately 25 to 30 days all told. Incidentally, I put in a lot of time which I had agreed with Mr. Strube I wouldn't charge for.

The Referee: Well, let us talk about what we are in issue here, and that is the time you spent in this employment here.

The Witness: Yes, sir.

The Referee: That is covered by this letter.

The Witness: There were approximately 40 days.

Mr. Gross: Your Honor, at this time, I believe

(Testimony of Milton C. Charles.)

we would like to make a correction in the record. I will ask the question again.

Q. Mr. Charles, when were you licensed as a C.P.A. in the State of California?

A. In June of 1954.

Q. Mr. Charles may have said 1944 before.

A. I thought I said 1954.

Q. Were you licensed in the State of New York as a C. P. A.?

A. Yes, the State of New York. I was licensed in 1932.

The Referee: In June, 1954, you were licensed in California?

The Witness: Yes, sir; and the certificate before [12] that I held in New York which I still hold. Incidentally, I received that in December of 1932.

Q. (By Mr. Gross): In your opinion, Mr. Charles, is \$100 per day a reasonable charge for the work you did at American Aeronautics?

A. As a matter of fact, I believe \$100 would be a minimum.

The Referee: Is 40 days all the work you did? You see, what this refers to is: "Because of the fact that this corporation appears to be entitled to a substantial income tax refund and has no moneys with which to pay your fees to do the necessary accounting and prepare and file the return in order to obtain it, it is our wish to make some arrangement with you for payment of your services in connection with the claim for refund." Now, how much time did you spend on the preparation of the claim for refund?

(Testimony of Milton C. Charles.)

The Witness: Well, the claim for refund itself?

The Referee: That is what I am talking about.

The Witness: That was the smallest part. The claim for refund in and of itself was probably only a few days.

The Referee: How many days?

The Witness: Probably two or three itself. The big part of the job was to get the books in shape so we would have the information.

The Referee: When did you do the labor in preparing [13] the refund?

The Witness: The labor for preparing the refund was in February, sometime in February or so, I believe.

The Referee: February of——

The Witness: ——1955.

The Referee: Go ahead, counsel.

Mr. Gross: We have no more questions of this witness.

Mr. Grodberg: No questions.

Mr. Gross: Excuse me. I have one more question.

Q. Have you received any money at all from American Aeronautics for any work you have performed? A. No, sir, not one dime.

Mr. Gross: No more questions.

Mr. Grodberg: No questions.

Mr. Gross: Nothing further, your Honor.

Mr. Grodberg: The Trustee has no further evidence.

Mr. Gross: I would like to point out, your Honor, if I may, that the assignment as it is worded

is somewhat ambiguous in referring only to the work to be done on the pending claim.

That is the reason we had Mr. Strube here today to explain exactly why the assignment was made. The fact was that Mr. Charles had been engaged and had put in a greater portion of 40 days prior to coming to Mr. Strube and asking about the fees, and as a result of that [14] conversation, this assignment was made and it was intended to cover all of the work done rather than the work just relating to the claim.

The Referee: Here is what strikes me about it. In here, he wants to be paid for 40 days, and in this document it says, "From estimates received from you, it would appear that you may take as much as 40 hours or more in work to be performed by you."

Mr. Gross: I am sorry, your Honor. I did forget to bring that out. If I may recall Mr. Strube, I should like to correct that.

The Referee: Very well.

Mr. Gross: Mr. Strube, will you take the stand again?

GORDON D. STRUBE

having been previously sworn, was examined and testified as follows:

Direct Examination

(Continued)

By Mr. Gross:

Q. Mr. Strube, directing your attention to the wording in that document, Petitioner's Exhibit 1, "From estimates received from you, it would appear that you may take as much as 40 hours or more," what prompted you to make a statement such as that? Where did you get the basis of an estimate such as that? [15]

A. Well, in the discussion that I had with Mr. Charles regarding his fees, we had been discussing the amount of work that he had accomplished up to this point and I was interested to know what sort of fees he had built up as a result of his work, and he mentioned at the time that if he continued to finish out the work that he had started and file these income tax returns that it would involve a total of about 40 days of work to go through and complete it.

Q. In other words, Mr. Strube, the question I am asking you is: Why do you have 40 hours down there rather than 40 days?

A. I believe the 40 hours is a dictation error or typographical error on my part. I haven't seen the letter in quite some time, but I was cognizant of the 40 days of work that Mr. Charles was to put in.

(Testimony of Gordon D. Strube.)

Q. To your knowledge, did Mr. Charles put in approximately 40 days of work on the books of American Aeronautics?

A. Yes, I know that he did.

Mr. Gross: No more questions.

Mr. Grodberg: I will have no further questions.

The Referee: Do you have anything further, Mr. Gross?

Mr. Gross: Nothing further, your Honor.

Mr. Grodberg: As far as the Trustee is concerned, [16] if the Court please, we think the document speaks for itself. It is a written assignment. Despite previous conversations, we submit that the agreement itself is the best evidence. We submit the document itself is the evidence.

Mr. Gross: We submit that the document is ambiguous.

The Referee: No, it is not ambiguous here.

Mr. Gross: It is ambiguous, your Honor, in that—may I see the document?

(Court hands document to counsel.)

Mr. Gross: Well, I don't know of any rule of law, your Honor, that would prevent both of the parties from testifying that there was a mistake in the document. It should be 40 days instead of 40 hours.

The Referee: No. There isn't anything that would keep them from testifying to that, but the point is: You are relying on this document.

Mr. Gross: Well, we have brought the parties

here and they have testified that he performed services for a period in excess of 40 days and no consideration was received for it, your Honor.

The Referee: This appears to be in connection with the claim for refund in reading the document, and the witness testified that he spent approximately two or three days in that work. [17]

Mr. Grodberg: I believe the petition and the order to show cause on which it is based is also based on the written document, if the Court please.

The Referee: Your only remedy here is to reform the assignment.

Mr. Gross: Well, there is no dispute between the parties, your Honor. I don't see any necessity to reform it. Both parties testified that it was in payment of all services.

The Referee: The bankrupt is not a party to this matter. The Trustee is the adverse party; not the bankrupt.

Mr. Gross: He stands in the shoes of the bankrupt, and the bankrupt has testified that it was his understanding that the document was to be for payment of the entire services rendered.

The Referee: I would allow your order to show cause to this extent.

Take the highest figure that Mr. Charles gave us here, which is three days, and the high figure of \$100 a day, which seems big to me but maybe it isn't for a certified public accountant.

There is no other evidence as to the value of the services.

The order can be granting allowing you that

amount, \$300, and the remainder, of course, would be [18] subject to a filing of a claim in the case.

Do you want findings and conclusions in this matter?

Mr. Gross: Yes, your Honor.

The Referee: Perhaps I should ask Mr. Grodberg to prepare those.

Mr. Grodberg: Yes, sir.

Mr. Gross: Your Honor, I don't like to belabor the point, but inasmuch as the Court has testified that 40 hours is binding, I wonder if the document isn't thereby made ambiguous because it calls for \$4,000 therefor.

The Referee: If I interpret this document, he had a tax refund and that is what we are talking about here, and this assignment was made to cover the work on the tax refund. The evidence you have offered is that some two or three days were spent in that matter.

Mr. Gross: Well, I believe the evidence is uncontradicted that the document was intended to cover all services rendered.

The Referee: That is not the way the document reads. What you are talking about is reformation, I think.

(Whereupon the hearing was concluded.)

[Endorsed]: No. 15302. United States Court of Appeals for the Ninth Circuit. Milton C. Charles, Appellant, vs. William N. Bowie, Jr., as Trustee in Bankruptcy of American Aeronautics Corporation, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 31, 1956.

Docketed: September 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15302
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MILTON C. CHARLES,

Appellant,

vs.

WILLIAM N. BOWIE, JR., as Trustee in Bankruptcy of
American Aeronautics Corporation, Bankrupt,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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FILED

DEC 27 1956

PAUL P. O'BRIEN, CLERK



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No. 15302

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON C. CHARLES,

Appellant,

vs.

WILLIAM N. BOWIE, JR., as Trustee in Bankruptcy of
American Aeronautics Corporation, Bankrupt,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Appellant Milton C. Charles requested a turn-over order as against appellee Trustee in Bankruptcy of American Aeronautics Corporation. After an unfavorable order, appellant had same reviewed before the District Court for the Southern District of California, Central Division, where said order was affirmed.

This appeal is brought under Title 28, United States Code, Section 1291, as being within the usual appellate jurisdiction of this court in actions of law.

Statement of the Case.

Appellant Milton C. Charles, a Certified Public Accountant [Tr. p. 23] was hired in July, 1954, to do the accounting for American Aeronautics Corporation by Gordon D. Strube, President of American Aeronautics Corporation, now a bankrupt corporation [Tr. p. 23].

In discussing the fees, the two men decided that inasmuch as the books had been neglected for some time [Tr. p. 20] and were in need of considerable work [Tr. p. 24], a *per diem* basis was most appropriate [Tr. p. 24].

In order to prepare the anticipated claim for tax refund, appellant necessarily had to restore the books to a reasonably workable condition [Tr. p. 28]. Appellant so worked until the beginning of 1955, at which time he approached Mr. Strube in an attempt to obtain or arrange for payment for his past and future service [Tr. pp. 24, 30]. At this time appellant and Mr. Strube discussed the services already rendered by appellant [Tr. p. 30], the terms and object of the employment, and agreed that appellant's employment would be ended upon his completing the necessary accounting to allow the books to be closed, then preparing the final statements [Tr. pp. 26, 30].

As a result of this meeting and conversation, Mr. Strube prepared Appellant's Exhibit 1, signed it, and delivered it to appellant on or about February 15, 1955 [Tr. pp. 20-21].

Pursuant to his last conversation with Mr. Strube and to Exhibit 1, appellant continued working on the books of the corporation [Tr. pp. 25-26], putting them in order and eventually filing the claim for refund [Tr. p. 28].

All in all, appellant put in over forty (40) actual working days on the books of the corporation [Tr. p. 26], two or three of which were spent in filling out the claim itself [Tr. p. 28]. Appellant testified that \$100.00 per day was a reasonable charge for his services [Tr. p. 27].

Appellant received no consideration whatever for any of his services other than said written assignment, being Appellant's Exhibit 1 [Tr. pp. 21, 28].

Appellant procured an Order to Show Cause why the appellee Trustee in Bankruptcy should not turn over to appellant the \$4,000.00 pursuant to said assignment [Tr. p. 4]. The Referee in Bankruptcy recognized said assignment only to the extent of \$300.00 [Tr. p. 8]. Thereafter appellant filed his petition to review said order before the District Court, which petition was denied and the order of the Referee affirmed [Tr. p. 14]. This appeal followed.

Although it does not appear on the face of this record, the records before the Referee in Bankruptcy did show that the claim for tax refund to which Exhibit 1 refers did in fact amount to a sum in excess of \$9,000.00, which sum had been received by the corporation.

Assignments of Error.

Appellant submits that the order of the Referee in Bankruptcy allowing the assignment only to the extent of \$300.00 is contrary to law and is not supported by the evidence for the following reasons:

1. NEITHER THE PAROL EVIDENCE RULE NOR THE RULE OF INTEGRATION APPLIES TO THE ASSIGNMENT HEREIN.

2. EVEN IF THE RULES OF PAROL EVIDENCE AND INTEGRATION APPLY, THE FACTS OF THIS CASE FALL WITHIN ANY ONE OF SEVERAL EXCEPTIONS THERETO.

3. THE TRUE INTENT OF THE PARTIES AND OF THE ASSIGNMENT WAS TO COMPENSATE APPELLANT FOR ALL SERVICES RENDERED.

4. IT IS NOT NECESSARY TO REFORM THE ASSIGNMENT.

5. THERE IS NO EVIDENCE AS TO THE AMOUNT OF WORK PERFORMED BY APPELLANT AFTER THE DELIVERY OF THE ASSIGNMENT.

ARGUMENT.

In all fairness to the Referee in Bankruptcy, it is conceded that wide latitude was permitted appellant in the introduction of oral testimony. However, it is submitted that the Referee's conclusion that this written assignment, Appellant's Exhibit 1, could not be explained or elaborated upon by way of extrinsic oral evidence [Tr. p. 33] is not supported by either the facts or the law of this case. Actually, not one of the facts herein is in dispute, so that of necessity the sole question involved are those of law. Simply stated, the ultimate issue here is whether or not this written assignment may be construed in the light of extrinsic oral testimony.

I.

Neither the Parol Evidence Rule nor the Rule of Integration Applies to the Assignment Herein.

It is conceded that the parol evidence rule and the rule of integration, where applicable, preclude the presentation of oral testimony to vary the terms of a written agreement. However, it is submitted that neither of these rules apply to the instant case. The basis of both of these rules is that oral testimony cannot alter the terms of an agreement which embodies all of the terms and conditions of prior negotiations and discussions. But these rules do *not* apply where the instrument does *not* purport to be a complete statement of the agreement of the parties.

Love v. Culvan, 87 Cal. App. 2d 608, 614;

10 *Cal. Jur.* p. 918.

In the instant case the assignment was obviously an informal writing, merely a memorandum, and not a formal agreement embodying all of the terms and agree-

ments of the parties. This conclusion is inescapable in view of the complete absence of details, conditions, promises, times or any of the other usual clauses found in formal agreements. Under these facts there is no valid reason whatever for the exclusion of oral testimony or for the failure of the Referee to construe the assignment in the light of the oral testimony.

II.

Even if the Rules of Parol Evidence and Integration Apply, the Facts of This Case Fall Within Any One of Several Exceptions Thereto.

1. The use of certain words or phrases without explaining the meaning of same in detail will *necessitate* the taking of extrinsic evidence to clarify the same. See the case of *Wacha v. Wacha*, 11 Cal. 2d 322, wherein the word "transaction" was allowed to be explained by parol evidence.

Civ. Code, Sec. 1647;

Civ. Code, Sec. 1649.

In the instant case the assignment expressly states that appellant ". . . may consider this an assignment of whatever refund we receive as a result of your services to the extent of \$4,000.00 for such services."

Further, the assignment refers to the "necessary accounting" to be performed by appellant, and this phrase is inherently in need of the extrinsic evidence to explain what the parties considered as "necessary accounting." Certainly, reasonable persons unfamiliar with the surrounding circumstances could have different opinions as to the meaning of "necessary accounting."

2. ". . . When the language employed is fairly susceptible of either one of two constructions contended

for, extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties . . .”

MacIntyre v. Angel, 109 Cal. App. 2d 425, 430.

3. In the case of *Smetherham v. Laundry Workers Union*, 44 Cal. App. 2d 131 at 139, the court stated:

“ . . . Where one construction would make the contract unusual or extraordinary, courts are to disregard such construction if the contract may reasonably be subject to a construction which is fair and just . . .”

To interpret the contract to read that appellant is to be paid \$4,000.00 for forty hours' work, or merely for filling out the claimed refund, is indeed an unusual or extraordinary interpretation, and the same should be disregarded.

4. The phrases “forty hours” and “\$4,000.00” are patently inconsistent and repugnant clauses. To hold that appellant is to receive \$4,000.00 for forty hours of work does, indeed, result in an “absurdity.” As stated in the case of *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 93, 100:

“But the language of a contract governs its interpretation only so far as it is clear and explicit and *does not involve an absurdity* (Civil Code, Section 1638). Language involving an absurdity is rejected, and so is any phrase or clause which is inconsistent with the object and intention of the parties. (Civil Code, Sections 1650, 1652, 1653).” (Emphasis added.)

In the instant case, any clause or construction inconsistent with the mutual intention of the parties, which was to reimburse appellant for *all* services rendered, should be rejected and disregarded, in accordance with the intent of both of the parties to the transaction.

III.

The True Intent of the Parties Was to Compensate
Appellant for All Services Rendered.

1. In determining the mutual intentions of the parties hereto, the attention of this Court is directed to the case of *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 226, wherein the Court stated:

“ . . . For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown. (Cases cited.)”

Civ. Code, Sec. 1636.

2. In the case of *Universal Sales Corp. v. California etc., Mfg. Co.*, 20 Cal. 2d 751, 761, the Court stated:

“ . . . As an aid in discovering the all important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the agreement . . . including the object, nature and subject matter of the writing . . . and the preliminary negotiations between the parties . . .”

Code Civ. Proc., Sec. 1860.

The Findings of Fact and Conclusions of Law of the Referee herein found as a fact that the assignment was intended to be in an amount “which would reasonably compensate said petitioner (appellant) for personal services to be performed by him in connection with doing the *necessary accounting for* and preparing and filing the income tax return required in order to obtain the said claim

for refund.” (Emphasis added.) [Tr. pp. 6-7.] Clearly, neither the income tax return nor the claim for refund could be filed until the “necessary accounting” had been performed by appellant to arrange and bring the books up to date. The assignment was not intended to distinguish between services rendered by appellant in preparing the books as opposed to services rendered by appellant in filling out the claim for refund. Yet this finding is the basis of the order of the Referee herein, which finding is wholly without evidentiary support. Rather, the assignment was intended to compensate appellant for doing the entire job, *i. e.*, the “necessary accounting” entailed in preparing the books *and* the filing of the claim for refund which, pursuant to the understanding, would satisfy appellant’s obligation under his contract of employment.

Concerning this point, appellant testified on pages 25-26 of the Transcript as follows:

“Q. Now, sometime in the early part of 1955 after you had performed some of these services for the American Aeronautics Corporation, did you have a discussion with Mr. Strube relative to payment for your services? A. As a matter of fact, it seems to me it was in the latter part of 1954. I believe it was sometime in December. It may have been shortly before the end of the year or shortly thereafter, and I had said, ‘Mr. Strube, you realize fully—you have seen me here practically every day. You realize fully that I have put in a great deal of time and now approximately six months have elapsed and I haven’t received one dime for my fee,’ and I said, ‘Of course, I don’t pay my rent on that basis and I think some consideration should be made.’

Q. (By Mr. Gross): Now, after that discussion with Mr. Strube, were you delivered by him personally this document which is Petitioner’s Exhibit 1?

A. Yes, that is it. That was a document that was delivered by Mr. Strube personally.”

Page 26:

“A. . . . I had told Mr. Strube after he had made this arrangement with me, or before then even, I said, ‘If you do what you propose to do, I would be very happy to continue, and even if the services and time will amount to a greater sum than I estimated, I will bring it through to a conclusion so that the books will be in such shape that you will have your closing at the end of the year and prepare any statements or anything else you may need.’ ”

On this same point, Mr. Strube testified at page 30 of the Transcript as follows:

“A. Well in the discussion that I had with Mr. Charles regarding his fees, we had been discussing the amount of work that he had accomplished up to this point and I was interested to know what sort of fees he had built up as a result of his work, and he mentioned at the time that if he continued to finish out the work that he had started and file these income tax returns that it would involve a total of about 40 days of work to go through and complete it.”

At this conversation shortly before the assignment, the parties discussed the services already performed by appellant, the terms of employment and the compensation due appellant. It was at this conversation that the parties decided that instead of continuously “keeping the books,” appellant’s obligation under the contract of employment would be discharged if he prepared the books for closing (“necessary accounting”) and filed the necessary statements (claim for refund). In view of the surrounding circumstances, the negotiations and discussions, it is clear

why the assignment referred to “services in connection with claim for refund.” Yet the Referee failed to construe said assignment in accordance with the mutual intention of the parties as evidenced herein.

3. The construction given the assignment by the acts and conduct of the parties is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts.

Whalen v. Ruiz, 40 Cal. 2d 294, 301.

The parties to the assignment clearly intended said assignment to reimburse appellant for all services performed on behalf of the bankrupt corporation, and yet the Referee wholly failed to construe said assignment in accordance with the interpretation placed thereon by the parties themselves.

It is submitted that the construction placed upon the assignment by the parties thereto, which construction is evidenced by their conduct and declarations before and after the assignment, is a fair and reasonable interpretation, *i. e.*, that the terms “necessary accounting” and “such services” were intended to cover *all* of the services performed by appellant for the bankrupt corporation. Certainly, “necessary accounting” would include the *preparation* of the *books*. Neither a return nor a claim for refund could be filed until the books had been straightened out and brought up to date, especially where, as here, the books were in a neglected condition. As appellant testified on page 28 of the Transcript:

“The Witness: Well, the claim for refund itself?

The Referee: That is what I am talking about.

The Witness: That was the smallest part. The claim for refund in and of itself was probably only a few days.

The Referee: How many days?

The Witness: Probably two or three itself. The big part of the job was to get the books in shape so we could have the information."

4. Contrary to legal principles, the Referee failed to interpret the uncertainty created by the assignment against the *maker* thereof, the bankrupt. It is fundamental that all uncertainties or ambiguities contained in a written instrument are resolved against the maker of that instrument.

Taylor v. J. B. Hill Co., 31 Cal. 2d 373, 374;
Civ. Code, Sec. 1654.

5. A contract must be given a fair and reasonable interpretation under all the circumstances, rather than an unusual or extraordinary construction. The contract must be interpreted in accordance with the mutual intention of the parties at the time of contracting.

Rost v. Bryson, 118 Cal. App. 2d 489, 493.

6. "Whether or not a writing is ambiguous is a question of law, and the lower court's finding on this issue is not binding on the appellate court. (Cases cited.)"

Wagner v. Shapona, 123 Cal. App. 2d 451, 460.

IV.

It Is Not Necessary to Reform the Assignment.

The assignment expressly provides for the payment of "\$4,000.00" for "necessary accounting," etc. Appellant is not seeking to change this figure in any way, and thus did not pray for reformation.

Further, the assignment merely recites an apparent estimate of "forty hours or more." Whether this was intended to mean "forty hours or more above what appellant has already done," or "forty days," or "forty hours or more with a maximum of forty days," or any other possible construction, is immaterial here. The sole question is whether or not appellant performed services of the reasonable value of \$4,000.00, the amount specifically set forth in the assignment. The evidence is uncontroverted that he did.

Furthermore, clauses which are inconsistent with the true intent and object of the parties may be disregarded by the court. This, of course, would mean that one of the inconsistent and ambiguous phrases, "forty hours or more" or "\$4,000.00 for such services," may be disregarded by the court *in accordance with the true intent of the parties*.

Civ. Code, Sec. 1640.

It is interesting to note that the Referee failed to consider the oral testimony introduced on the ground that this instrument must first be reformed and that such reformation was not within his power [Tr. pp. 31-33]. Yet the order of the Referee is in itself reformation of the instrument, causing it to read "\$300.00" in the place and stead of "\$4,000.00," contrary to the mutual intention of the parties. It is submitted that reformation was neither requested nor necessary, and that an order therefore is contrary to law.

V.

There Is No Evidence as to the Amount of Work
Performed by Appellant After the Delivery of the
Assignment.

The Referee's Certificate on Review indicates that he intended to "give effect to the assignment only to the extent of the value of the services rendered after the date of the assignment" [Tr. p. 12]. However, at the hearing the Referee had taken the position that appellant could recover only for time spent on the actual refund itself, regardless of services rendered after the date of the assignment [Tr. p. 28]. As a result the record is barren of any evidence whatever as to the amount of services rendered by appellant after the assignment, except that appellant stated generally that "I had put in the year of 1954 alone approximately 25 to 30 days all told." Certainly if appellant is entitled to compensation for all services rendered *after* the date of the assignment, the record should be clarified by the taking of further testimony on this point. Appellant should be afforded at least this opportunity, since the precise issue was never raised by the Referee at the original hearing, appellant had no reason to consider this issue at all material, and the first notice appellant had of its materiality was upon receiving a copy of the Referee's Certificate on Review some time after the hearing.

VI.

Conclusion.

As discussed above, extrinsic evidence is admissible to explain the assignment on any one of several grounds:

1. The assignment did *not* purport to be a complete statement of the obligations of the parties, and the parol evidence rule and the rule of integration are therefore inapplicable.

2. The assignment is capable of more than one interpretation.

3. “Necessary accounting” and “such services” are patently uncertain, and may be explained by extrinsic evidence.

4. The interpretation of the Referee that the assignment compensates appellant in the amount of \$4,000.00 for forty hours work, results in an “absurd,” “unusual” and “extraordinary” construction.

5. “\$4,000.00” for “forty hours” are inherently inconsistent and repugnant clauses, in need of explanation.

Once the conclusion is reached that extrinsic evidence is admissible, it cannot be denied that the true intent of the parties and of the assignment was to compensate appellant for *all* services rendered. Such an interpretation is supported by the following facts:

1. The *surrounding circumstances* at the time of the assignment.

2. The *acts and declarations* of the parties before and after the assignment.

3. The *interpretation* placed on the assignment by the parties thereto.

4. That the assignment should be construed *against the maker* thereof, to wit, the bankrupt.

5. Any other interpretation would result in the “extraordinary” or “absurd” or “unusual” result that appellant was to be paid \$4,000.00 for forty hours’ labor, or \$4,000.00 for merely filling out a claim for refund.

It is submitted that Referee, sitting as a Court of Equity, could and should have afforded appellant complete relief as prayed for in his original petition.

Appellant requests that the Order of the Honorable Referee be reversed and that appellee Trustee in Bankruptcy be ordered to pay to appellant the sum of \$4,000.00; or, that the case be remanded to the Referee for further evidence on the point of services rendered after the assignment, with directions consistent with the principles of law discussed herein.

Respectfully submitted,

MARVIN GROSS, and
ANTHONY T. CARSOLA,

Attorneys for Appellant.

No. 15302

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON C. CHARLES,

Appellant,

vs.

WILLIAM N. BOWIE, JR., as Trustee in Bankruptcy of
American Aeronautics Corporation, Bankrupt,

Appellee.

APPELLEE'S OPENING BRIEF.

HASKELL H. GRODBERG,
911 Van Nuys Building,
210 West 7th Street,
Los Angeles 14, California,
Attorney for Appellee.

FILE

JAN 25 1957

PAUL P. O'BRIEN,

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No. 15302

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON C. CHARLES,

Appellant,

vs.

WILLIAM N. BOWIE, JR., as Trustee in Bankruptcy of
American Aeronautics Corporation, Bankrupt,

Appellee.

APPELLEE'S OPENING BRIEF.

Statement of Facts.

Appellant Milton C. Charles filed his Petition for an Order to Show Cause in which he alleged that the now bankrupt American Aeronautics Corporation made an assignment in writing to him of the sum of \$4,000.00 from a Federal Income Tax Refund due from the Director of Internal Revenue [Tr. p. 3]. Appellant's attorney in his opening statement stated that he was proceeding upon a written assignment [Tr. p. 19]. The said writing was introduced in evidence by appellant who relies upon the same herein [Ex. 1; Tr. p. 21].

The appellant, a certified public accountant, [Tr. p. 23] was employed by the said bankrupt in July of 1954. His said employment was for two purposes: first, to straighten up the books of the bankrupt; second, to perform certain audits and other general work in connection with anticipated litigation that the bankrupt was going to enter into [Tr. pp. 20, 24]. Not until or on about February 15, 1955, was the written assignment, which is the basis of the case at bar, executed and delivered [Tr. pp. 20, 21, 25]. It was expressly for compensating for work to be performed in connection with a claim for an income tax refund [Tr. p. 22].

The said American Aeronautics Corporation was adjudicated a bankrupt on September 1, 1955, and thereafter the appellee herein duly took office as its Trustee in Bankruptcy.

The terms of said written assignment are prospective rather than retroactive in nature. They state, in part, that the bankrupt had no moneys with which to pay appellant's fees "*to do* the necessary accounting and prepare and file the return in order to obtain" a substantial income tax refund (italics supplied). The document further states that the work was "*to be* performed by you." (italics supplied). [Tr. p. 22]. The writing did not assign any specific amount of money to the appellant for the said services. It did not state that his payment should be "in the amount of" \$4,000.00. On the contrary, it provided that "you may consider this an assignment of what-

ever refund we receive as a result of your services to the *extent* of \$4,000.00 for such services” (italics supplied) [Tr. p. 22].

Appellant testified that he spent two or three days on the preparation of the claim for refund and that “the labor for preparing the refund” was performed in February of 1955 [Tr. p. 28]. The appellant testified that a reasonable charge for his work was \$100.00 per day [Tr. p. 27].

The Referee, after considering the written assignment and the oral evidence adduced, held that the sum of \$300.00 had been assigned to appellant from the fund derived from the income tax refund [Tr. p. 32; pp. 5-8]. The balance of appellant’s claim was, of course, subject to the filing of a claim as a general creditor in the bankruptcy proceeding [Tr. p. 33]. The court found that there were sufficient funds on hand to pay the sum of \$300.00 aforementioned [Tr. p. 7].

ARGUMENT.

I.

The Parol Evidence Rule Applies to the Written Assignment Herein, and Extrinsic Evidence Should Not Be Permitted to Contradict the Terms of the Written Agreement.

The parties deliberately put their engagement in writing in such terms as import a legal obligation. The said writing, to wit, Exhibit 1, imports on its face to be a complete expression of the whole agreement. Parol evidence cannot be suffered to add other terms to the agreement or to vary or contradict the terms thereof.

Lande v. Southern California Freight Lines, 85 Cal. App. 2d 416, 421;

Hale v. Bohannon, 38 Cal. 2d 458, 465;

Harrison v. McCormick, 89 Cal. 327, 330;

Civ. Code, Sec. 1625.

The writing is to be construed as containing all of the terms of the contract, for the writing itself is the contract.

Estate of Gaines, 15 Cal. 2d 255, 265;

Nourse v. Kovacevich, 42 Cal. App. 2d 769;

18 Cal. Jur. 2d 737.

Accordingly, where a written agreement, as in the case at bar, clearly sets forth that it is an arrangement for payment for services in connection with a "claim for refund," parol evidence should not be permitted to change said agreement into a radically different and contradictory thing, to wit, into an assignment for the purpose

of compensating for work done in straightening up the bankrupt's books or for performing audits and other general work in connection with anticipated litigation that the corporation was going to enter into.

II.

The Intent of the Parties Was Clearly Expressed in the Written Assignment.

The contract in the case at bar says in plain language forty (40) "hours." That word should not be interpreted to mean forty (40) "days" as appellant contends.

The contract in the case at bar is expressly prospective in its terms; it uses future indications such as the phrase "to be performed." Those words should not be interpreted to mean "already performed" as appellant in effect contends.

The contract in the case at bar expressly limits funds assigned to an "extent." That word should not be interpreted to mean "amount" as appellant in effect contends.

"It is a fundamental rule of construction of contracts that the intention of parties must be ascertained, if possible, from the language of the instruments and when so ascertained should be given effect."

French v. French, 70 Cal. App. 2d 755, 757;

Sun-Maid Raisin Growers v. Jones, 96 Cal. App. 650, 653;

Pendleton v. Ferguson, 15 Cal. 2d 319, 323.

III.

Appellant Was Permitted Wide Latitude in the Presentation of All of the Evidence He Wished; the Referee Made His Findings and Order With All of This Evidence Before Him and there Was Ample Evidence to Support the Same.

The Referee did not exclude any evidence which appellant offered. Even assuming that there was ambiguity in the terms of said written assignment, appellant had wide latitude in introducing all the evidence he wished at the hearing. The Referee had before him for consideration both the written document upon which appellant's petition was based and, in addition, the testimony of witnesses whose credibility and demeanor he had full opportunity of assessing and judging.

The written agreement itself was the first and highest evidence as to the intent of the parties in executing it.

Davis v. Basalt Rock Co., 114 Cal. App. 2d 300, 303.

The court should not disturb the findings of the Referee unless they are manifestly unsupported by the evidence.

Matter of Musgrave, 48 A. B. R. (N. S.) 683, 27 Fed. Supp. 341.

The court shall accept the findings of fact of a referee "unless clearly erroneous."

General Order in Bankruptcy No. 47.

The court should not disturb the findings of the Referee upon disputed issues of facts

“unless there is most cogent evidence of mistake and miscarriage of justice. . . . Realizing that the Referee, having heard the witnesses in person, is in a much better position than the court to determine the credibility of witnesses and the truth as to disputed facts, I am unable to say that the action of the Referee in this respect is clearly erroneous, and hence the petition for review is denied. . . .”

Matter of Roark, 48 A. B. R. (N. S.) 428, 28 Fed. Supp. 515, 518.

IV.

The Written Assignment in Controversy Cannot Be Interpreted so as to Reform It.

Appellant expressly pleaded a written assignment [Tr. p. 3]. The case was tried on the basis of the said alleged assignment in writing [Tr. p. 19]. The alleged assignment was introduced into evidence [Tr. p. 22; Ex. 1].

If there is a mistake in a contract, it must be pleaded and remedied through a complaint for reformation.

Harding v. Robinson, 175 Cal. 534, 541, 542.

A complaint on an express contract should show the agreement and compliance therewith.

Foley-Carter Insurance Co., Inc. v. Commonwealth Life Insurance Co., 128 F. 2d 718;

Fed. Rules of Civ. Proc., Rule 8(a).

V.

There Is Ample Evidence as to the Amount of Work Performed by Appellant After the Delivery of the Assignment and Pursuant Thereto.

The assignment itself was executed and delivered on or about the date it bears, to wit, February 15, 1955 [Tr. p. 25]. The assignment by its terms limits the assigned funds to work done in connection with the claim for refund [Ex. 1; Tr. p. 22]. This labor was performed in the month of February, 1955 and required two or three days [Tr. p. 28].

Respectfully submitted,

HASKELL H. GRODBERG,

Attorney for Appellee.

No. 15308

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

VS.

MARGUERITE MAY DONALDSON and EL-
MIRA DONALDSON LUCKER,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

JAN 14 1957

PAUL P. O'BRIEN, CLERK

No. 15308

United States
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UNITED STATES OF AMERICA, Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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304 Spring Street,
Seattle, Washington,

Attorneys for Appellee.

In the United States District Court, Western
District of Washington, Northern Division

No. 3760

MARGUERITE MAY DONALDSON,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendant, complains and alleges:

I.

The jurisdiction of this cause of action is conferred upon the above entitled Court by the provisions of Title 38, U.S.C.A., Sections 445, 551 and 817.

II.

That the plaintiff is now a resident of the County of King, State of Washington, Western District of Washington, Northern Division, of the District Court of the United States.

III.

That the plaintiff is the mother of Allen Perry Donaldson, who died on or about March 24, 1952.

IV.

That the said Allen Perry Donaldson, as a member of the United States Naval Reserve, applied for and was granted, as of August 6, 1943, a National Service Life Insurance Policy No. N-13 801 319, in

which policy he designated as principal beneficiary his mother, Marguerite May Donaldson, and also designated as contingent beneficiary his father, William Nelson Donaldson, said policy being approved in the amount of \$10,000.00.

V.

That the said Allen Perry Donaldson was hospitalized on September 3, 1943 for treatment of a condition diagnosed as Hodgkin's Disease and that he was discharged to limited duty on January 15, 1944. In July, 1944 he was hospitalized for follow-up examination and in August, 1944 he was discharged to duty. He was discharged honorably in October, 1945.

VI.

That the said Allen Perry Donaldson was totally disabled from the time of discharge. That the said Allen Perry Donaldson was unable to hold any employment any length of time subsequent to his discharge from service. That he was constantly sick for various periods of time resulting in his having to give up his various types of work. That his employment was only maintained because of the willingness of his employers to take him back to work after various periods of illness. That at the time of his death, which was caused as a result of Hodgkin's disease, the said Allen Perry Donaldson was receiving one hundred per cent disability pension from the United States Government due to his service connected total disability.

VII.

That due to the nature of the disease, it was impossible for Allen Perry Donaldson to know his condition, especially in view of the errors in diagnosis, until some time after 1948. That he was only aware of the cause of his illness at that time and therefore was in no position with respect to knowledge, to file any premium waiver application. That at the time the real cause of his illness was discovered, the knowledge was available to the defendant through the various veteran departments.

VIII.

That the plaintiff heretofore filed a claim with the Veterans Administration, Washington, D. C., as principal beneficiary of the said insurance policy; that the claim was denied by the Disability Insurance Claims Division. That thereafter, plaintiff duly and regularly filed a notice of appeal from this denial with the Board of Veteran Appeals, Veterans Administration, Washington 25, D. C. That said appeal was denied by the Board of Veteran Appeals in a letter addressed to the plaintiff September 14, 1953.

IX.

That the plaintiff is entitled to receive the benefits of the entire policy as the principal beneficiary under said policy as his disability began with the original inception of the disease in 1943.

Wherefore, plaintiff prays as follows:

1. For judgment against the United States of America in the full amount of the proceeds due

and payable under the said National Life Insurance policy heretofore issued on the life of Allen Perry Donaldson.

2. That the Administrator of the Veterans Administration, Washington, D. C., be directed to pay the plaintiff herein the full amount of said National Service Life Insurance Policy.

3. For attorney fees as made and provided by statute.

4. That the plaintiff have such other and further relief as to the Court may seem just and equitable.

/s/ JOHN F. DORE,

YOTHERS, LUCKERATH & DORE

Attorneys for Plaintiff

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 10, 1954.

[Title of District Court and Cause.]

ANSWER

The defendant, United States of America, answers the Complaint of the plaintiff and admits, denies and alleges as follows:

I.

The defendant admits the allegations contained in paragraphs I, II, III, IV, and V of the plaintiff's Complaint herein.

II.

The defendant denies every allegation contained

in paragraph VI of the plaintiff's Complaint herein.

III.

The defendant denies every allegation contained in paragraph VII of the plaintiff's Complaint herein.

IV.

The defendant admits the allegations of paragraph VIII of the plaintiff's Complaint herein.

V.

The defendant denies every allegation contained in paragraph IX of the plaintiff's Complaint herein.

For a further answer and affirmative defense, the defendant alleges:

I.

That effective August 6, 1943, the said Allen Perry Donaldson was issued National Service Life Insurance in the amount of \$10,000.00 under certificate number N-13 801 319; that premiums were paid on this insurance by deductions from the insured's service pay through December 5, 1945, and that the insurance lapsed for nonpayment of the premium due on December 6, 1945, and was never in force thereafter.

Wherefore, the defendant having fully answered the Complaint of the plaintiff herein, prays;

(1) That the Court enter judgment denying the relief prayed for in the plaintiff's Complaint.

(2) That the Court enter judgment for the de-

fendant and against the plaintiff for all of the defendant's taxable costs herein incurred.

(3) For such further relief as to the Court may seem just and equitable.

/s/ CHARLES P. MORIARTY,

United States Attorney

/s/ JOHN A. ROBERTS, JR.,

Assistant United States Attorney

Acknowledgment of Service Attached.

[Endorsed]: Filed February 15, 1955.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 3760

MARGUERITE MAY DONALDSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

ELMIRA DONALDSON LUCKER,

Applicant for Intervention.

APPLICATION IN FURTHERANCE OF IN-
TERVENOR'S MOTION TO INTERVENE
AND FILE HER COMPLAINT IN INTER-
VENTION

In view of the Court's ruling on the intervenor's motion to file her complaint in intervention in the

above action, which, on February 6, 1956, was denied on the grounds such motion was too late and in view of the Court's further ruling in part as follows:

1. "It may be that in the event the Court finds for the plaintiff, that an interpleader action might still be filed, I don't rule on that", and in view of the Court having found for the plaintiff and having further, in the memorandum opinion, in part, in brief, found substantially as follows: "That the insured, in the policy in question, was totally disabled from the time of his discharge from the Navy to the time of his death for the purpose of gainful occupation, and

"2. That the insured, by reason of the Navy's failure in diagnosing his illness as Hodgkin's Disease, did not know that he was totally disabled when he, in fact, was; that for this reason he did not conceive he had the right to make application for waiver of premiums on the policy of insurance sued on; that this was a circumstance beyond his control, which caused him to fail to make timely application for waiver of premiums because of total disability at the time that the policy lapsed, or at any time thereafter until his death."

Comes now the intervenor and makes the following additional showing to the Court, urging her right to intervene in the interests of expediency and justice:

I.

Restates the facts set forth in her original Complaint in Intervention.

II.

States that she was married to the insured, Allen Perry Donaldson, while he was in the Navy, October 14, 1944; that as early as 1945, her husband, the insured, Allen Perry Donaldson, and his mother, the plaintiff in this action, Marguerite May Donaldson, expressed the intent to have your petitioner made beneficiary in the policy in question.

III.

The the insured, her husband, Allen Perry Donaldson, again expressed this intent in October of 1945, when he was discharged from the Navy.

IV.

That in September of 1948, the insured, her husband, Allen Perry Donaldson, again expressed his intent that your petitioner be beneficiary for the benefit of the minor children and when he learned at that time he definitely had Hodgkin's Disease, he did everything in his power to carry this intent into actuality by taking the matter up with the VFW, who handles these matters for veterans, and executing to them a power of attorney to do all things possible and necessary in this regard.

V.

That from that date on to the date of his death, her husband, Allen Perry Donaldson, the insured in the policy in question, expressed this intent to her and other parties and stated that he had done everything possible to carry this into effect but that it would have to be determined after his death by Court action.

VI.

That the plaintiff in this action, Marguerite May Donaldson, and her husband, at all times advised your petitioner's husband, Allen Perry Donaldson, the deceased and insured, that his desires would be effected, if possible, by instituting suit after his death.

VII.

That in view of this assurance, she left the matter in the hands of the plaintiff in this action, Marguerite May Donaldson, and her husband; that she saw the plaintiff in this action, Marguerite May Donaldson, and her husband in October of 1955 and Christmas of 1955, but neither one of them mentioned that this action was pending or the trial date, and that she knew nothing about the same; that in this connection, she had a telephone conversation with the plaintiff in this action on or about January 17, 1956, talking about the children, and that the insurance and the fact that this action was set for trial on January 19, 1956 was not mentioned to her; that on or about January 18, 1956, a representative of the FBI called her on behalf of attorney John Roberts, the United States attorney handling the defense of the case, and asked her about the action to collect on the insurance; she advised him she knew nothing about it. Later on, on that date, attorney John Roberts called your petitioner on the telephone and talked to her about the action and said that he assumed she would be a witness at the time of the trial. That on that same date, your petitioner endeavored to call the

plaintiff in this action, Marguerite May Donaldson, and found that the telephone was disconnected and therefore went out to talk to her about the matter of the suit on the insurance policy. That she asked the plaintiff in this action, Marguerite May Donaldson, if she remembered Allen's wishes that the insurance was to go for the benefit of the children. She said that she did and your intervenor asked her if this was going to be done. She was evasive and stated that they had not discussed it and had not decided what to do with the money if there was a recovery. She further advised your petitioner that she did not know the exact time of the trial, which, in fact, was at 1:00 P.M. on January 19, 1956. That your petitioner then immediately called Lester Pope, attorney for the Veterans Administration, and he advised her to call an attorney to represent her; that she then immediately had her husband call Fred G. Clarke, Jr. of Clarke, Clarke & Albertson; that your petitioner, represented by Fred G. Clark, Jr. of Clarke, Clarke & Albertson, then appeared in Court and got out a Motion to Intervene and a Complaint in Intervention.

VIII.

That the policy referred to is now and was at all times since its issuance in full force and effect; that intervenor is entitled to recovery of the proceeds upon the death of her husband while said policy was in force and effect.

Wherefore, intervenor prays for judgment

against the defendant in the sum of \$10,000.00 and costs of this action.

CLARKE, CLARKE &

ALBERTSON,

Attorneys for Intervenor

Acknowledgment of Service Attached.

[Endorsed]: Filed February 14, 1956.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF COMPLAINT
IN INTERVENTION

State of Washington

County of King—ss.

Elmira Donaldson Lucker, being first duly sworn on oath deposes and says as follows:

That on October 14, 1944, she was married to Allen Perry Donaldson, then in the United States Navy. That shortly prior to this time, he had been ill, which illness was diagnosed as Hodgkin's Disease. That in the summer of 1944, he had a physical recheck by the Navy at Sand Point and was given a clear bill of health and advised that he did not have Hodgkin's Disease; that since he was apparently all right physically, your affiant and Allen Perry Donaldson were married on October 14, 1944.

That in early 1945, Marguerite May Donaldson, the mother of Allen Perry Donaldson, advised him, in the presence of affiant, to change the beneficiary

on his National Service Life Policy to your affiant, and Allen Perry Donaldson at that time expressed his intention to change the beneficiary to your affiant. In October of 1945, when her husband, Allen Perry Donaldson, was discharged from the Navy, apparently with a clean bill of health, he again advised her of his intention that she be the beneficiary under his National Service Life Policy.

That in September 1948, when her husband, after rediagnosis at the Veterans Hospital at Vancouver, Washington, was advised he had Hodgkin's Disease, he again expressed his intention of rechecking his National Service Life Policy rights, to back pay, and total disability; and both he and his father, while residing at 1113 Aurora Avenue, the home of his parents, stated to her, in the presence of the plaintiff, Marguerite May Donaldson, that they were going down to the VFW to check rights to insurance, changing the beneficiary to her for the benefit of the children, rights to back pay and rights to total disability. That in September of 1948, in furtherance of this, Allen Perry Donaldson executed a Power of Attorney to the VFW, Form P22, on September 22, 1948, to do all things possible for him in this connection. That at this time, her husband advised her that there was nothing further he could do; that suit would have to be brought after his death to determine the questions in connection with the insurance.

That in June of 1949, her husband, Allen Perry Donaldson, at a time when they were living on Queen Anne Hill, again stated to her that he was

going to check with the VFW in connection with the insurance, and advised her that there was no change in the status; that it was his understanding that suit would have to be brought after his death.

That her husband, Allen Perry Donaldson, the insured in the policy in question, was bed-ridden in bad shape from October, 1951 until his death March 24, 1952, at which time, they were living at Alderwood Manor. That on more than one occasion, while he was bed-ridden, in the presence of your affiant and his mother, the plaintiff in this action, and his father, he expressed the desire that suit be brought on the insurance after his death and also the further desire that it be certain that the wife and children receive the proceeds of the insurance if the suit were successful; that both the plaintiff, Marguerite May Donaldson, and her husband, in the presence of Allen Perry Donaldson, and in the presence of your affiant, on these occasions, advised him not to worry; that this would be done and the matter taken care of; that on or about March 24, 1952, your affiant and the plaintiff, Marguerite May Donaldson, and her husband, went to the Veterans Hospital in connection with the death of her husband, Allen Perry Donaldson; that at that time, the husband, Mr. Donaldson, in the presence of the plaintiff, Marguerite May Donaldson, and your affiant, stated that he was going to take care of the insurance personally and see that the wife and children were taken care of; that later on that date, March 24, 1952, the date of the death, and after the death of Allen Perry Donald-

son on that date, the plaintiff in this action, Marguerite May Donaldson, stated to your affiant that they were going to bring an action on the insurance policy and see to it that your affiant and the children obtained the proceeds of the policy if the suit was successful.

Again, in April of 1952, the plaintiff in this action, Marguerite May Donaldson, stated to this affiant that she had received a denial of the insurance claim from the Veterans Administration and stated that action would be brought and that the wife and children would get the benefits of the insurance if the action was successful. That your affiant in July, 1953, advised the plaintiff in this action, Marguerite May Donaldson, and her husband, that she was going to marry one George Luckner; that the plaintiff and her husband objected, thinking that this would give up certain rights that the children had through Social Security and the Veterans Administration; that the marriage to George Luckner took place August 21, 1953; that no benefits were lost for the minor children of your affiant and her deceased husband, Allen Perry Donaldson, since the children were not adopted by her husband, George Luckner, so that these benefits still could be received. That from the date of the marriage to George Luckner, August 21, 1953, until about October, 1955, your affiant saw very little, if anything, of the plaintiff, Marguerite May Donaldson, and her husband, Mr. Donaldson. That in October of 1955 and Christmas of 1955, this affiant took the three minor children of herself and her deceased

husband, Allen Perry Donaldson, to the home of his parents; that on these two occasions, nothing was said about the insurance claim. That your affiant next talked to the plaintiff in this action, Marguerite May Donaldson, on the telephone on or about January 17, 1956, discussing the children and a nephew. That the insurance and suit on the insurance was not discussed.

That on January 18, 1956, for the first time, your affiant heard about the pendency of the action on the insurance policy through an FBI agent calling on behalf of attorney John Roberts who was defending the action, who asked her if she knew about the suit on the insurance policy by the plaintiff in this action. She said she did not. Later on that same day, attorney John Roberts called her and said that he assumed she would appear as a witness in the trial in connection with the suit on the policy which was to be 1:00 P.M. on January 19, 1956; that your affiant was very surprised and she immediately on that same date endeavored to call the plaintiff in this action, Marguerite May Donaldson; that the phone was disconnected and she accordingly drove out to the home of the plaintiff and her husband at Alderwood Manor; that she advised the plaintiff she had heard about the suit on the insurance policy and the fact that the trial date was 1:00 P.M. January 19, 1956, the next day. Your affiant asked the plaintiff if she remembered Allen's desire in connection with the insurance proceeds that they should go to her for the benefit of the children; the plaintiff stated that she did remember; your affiant then asked her "have

you decided what you are going to do with the money if the suit on the policy is successful?"; that the answer to this question was evasive and plaintiff stated that there had been no decision made, and that the matter had not even been discussed; and also stated that she did not know the exact time of the trial and endeavored to change the subject.

That your affiant, immediately upon finding that apparently the situation was not as she thought it was and that the wishes of her deceased husband were not going to be carried out, immediately called the Veterans Administration attorney, Mr. Lester Pope, and explained the situation; that he advised the time was short and to contact an attorney; that she also called United States District Attorney John Roberts, defending this matter. He also said that the time was short. Your affiant then called attorney Fred G. Clarke, Jr., of Clarke, Clarke & Albertson, on the morning of January 19, 1956; that he accordingly prepared a Motion to Intervene and a Complaint in Intervention and appeared in Court at 1:00 stating the position of your affiant and filed a Motion for Intervention and Complaint in Intervention.

/s/ ELMIRA DONALDSON LUCKER

Subscribed and sworn to before me this 13th day of February, 1956.

[Seal] /s/ FRED C. CLARKE, JR.

Notary Public in and for the State of Washington,
residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 14, 1956.

[Title of District Court and Cause.]

COMPLAINT IN INTERVENTION

Comes now the plaintiff and for cause of action in intervention, alleges as follows:

I.

That she is a citizen and resident of the United States, and resides in Seattle, Washington.

II.

That prior hereto, she was the wife of Allen Terry Donaldson, a member of the Armed Forces of The United States of America, and the named insured in the policy of insurance which is the subject matter of this complaint herein, as is more particularly set forth.

III.

That as a result of the marriage of the plaintiff with the said Allen Terry Donaldson, there were three children born, now of the ages of six, seven and eight, all being minors, residing with plaintiff at her home in Seattle; that the plaintiff was married to the said Allen Terry Donaldson on October 14, 1944, and remained as his wife continually until his death on November 24, 1952.

IV.

That while her deceased husband was a member of the Naval Forces of The United States, he applied for and was granted an insurance policy in the sum of \$10,000.00 insuring his life, which provided for total disability benefits in the event of

his total disability and waiver of premiums during such disability.

V.

That while said policy was in full force and effect, he contracted a disease known as Hodgkin's Disease, which he was advised would ultimately cause his death; that said disease totally and completely incapacitated the said deceased from engaging in any form of occupation whatsoever.

VI.

That when said insurance was effected by the deceased, he named his mother, the plaintiff in this action, as the beneficiary in said policy; that when he was advised that he had contracted Hodgkin's Disease, he endeavored to make application for benefits under the policy and secure premium waivers during his disability and to change the beneficiary from his mother to his then wife, the intervenor herein.

VII.

That he expressed the intention that he desired to change the beneficiary in the policy from his mother to his then wife, the intervenor herein and followed such expression of intention with an effort to secure a change of beneficiary under said policy, in accordance with his intention.

That though his efforts were directed at obtaining a change of beneficiary, he was advised that he had no rights under the policy and that suit would have to be brought after his death.

VIII.

That the mother, Marguerite May Donaldson, the beneficiary under said policy, assured the intervenor herein prior to the death of her husband, Allen Terry Donaldson, and also informed her deceased son, that after recovery was made on the policy, the proceeds would go to intervenor herein for the benefit of her three minor children; that shortly after the death of the insured, intervenor was again advised by the mother of the deceased husband that the proceeds would go to the intervenor for the benefit of her children.

IX.

That intervenor's knowledge of the pendency of this suit was unknown until the 19th day of January, 1956; that at no time was she advised that there was any action pending by her mother-in-law to collect the proceeds of this policy, and immediately intervenor brought this intervention, endeavoring to assert her rights herein; that intervenor is entitled to judgment against the defendant for the full sum of \$10,000.00, being the proceeds of said policy.

X.

That said policy referred to is now and at all times since its issuance has been in full force and effect and intervenor is entitled to recover the proceeds upon the death of her husband while said policy was in force and effect.

Wherefore, intervenor prays for judgment against

the defendant in the sum of \$10,000.00 and costs of action.

CLARKE, CLARKE & ALBERTSON
/s/ FRED C. CLARKE, JR.
Attorneys for Intervenor

Duly Verified.

[Endorsed]: Lodged Jan. 20. Filed Feb. 27,
1956.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT IN
INTERVENTION

Comes now the defendant, United States of America, and for answer to the Complaint in Intervention of Elmira Donaldson Lucker, on file herein, admits, denies and alleges as follows:

I.

Answering paragraphs I, II, and III, the defendant admits the same.

II.

Answering paragraphs IV, V, VI, VII and VIII, the defendant denies the same for lack of sufficient information or belief.

III.

Answering paragraphs IX and X, the defendant denies the same.

Wherefore, having fully answered the Complaint of the Intervenor, Elmira Donaldson Lucker, the

Defendant, United States of America, prays that the same be dismissed with prejudice and that the Court allow the defendant its taxable costs herein incurred.

/s/ CHARLES P. MORIARTY

United States Attorney

/s/ JOHN A. ROBERTS, JR.

Assistant United States Attorney

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial before the Honorable William J. Lindberg, Judge of the United States District Court, Western District of Washington, Northern Division, on the 19th day of January, 1956; and the plaintiff having been represented by her attorneys, John F. Dore and William H. Mullen; and the defendant, United States of America, having been represented by Charles P. Moriarty, the United States Attorney for the Western District of Washington, and his Assistant, John A. Roberts; and testimony having been taken in open Court, and certain documents and evidence having been introduced and admitted into evidence; and a certain pre-trial order incorporating the stipulation of certain facts having been admitted into the record as evidence by agreement

of the parties, and also other facts and exhibits having been agreed to; and the Court having considered Memoranda of Authorities and the written and oral arguments of counsel, this Honorable Court hereby makes the following:

Findings of Fact

I.

That jurisdiction of this cause of action is conferred upon the above entitled Court by the provisions of Title 38, U.S.C.A., Sections 445, 551 and 817.

II.

That the plaintiff, Marguerite Allen Donaldson, at the time of the filing of this complaint, was and now is a resident of the county of Snohomish, State of Washington, in the Western District of Washington, Northern Division, of the District Court of the United States. That the plaintiff is the mother of Allen Perry Donaldson, who was formerly, before his death, a member of the Armed Forces of the United States of America, namely a coxswain in the United States Naval Reserve. That Allen Perry Donaldson died on March 24, 1952. That such death is evidenced by a duly authenticated death certificate which was admitted as evidence. That cause of death was officially found to be Hodgkin's Disease. That this is a fatal disease, and according to medical testimony, no known case has ever been cured.

III.

That the said Allen Perry Donaldson when a

member of the United States Naval Reserve, applied for and was granted as of August 6, 1943, a National Service Life Insurance policy, No. N 13 801 319, which policy designated as principal beneficiary his mother, Marguerite Allen Donaldson, and also designated as contingent beneficiary his father, William Nelson Donaldson, said policy being approved in the amount of Ten Thousand (\$10,000.00) Dollars.

IV.

That the said Allen Perry Donaldson was hospitalized on September 3, 1943, while overseas at Base Hospital No. 3, for treatment of a condition which was later diagnosed, on September 11, 1943, as Hodgkin's Disease. He at that time was classified as unfit for duty. Shortly thereafter he was transferred to the Naval Hospital at Oakland, California, and there a biopsy was performed and the analysis showed Hodgkin's Disease, and verified the previous analysis made overseas. In July of 1944 the veteran was transferred into his home area, namely, to the United States Naval Hospital at Seattle, and there he was admitted as a patient for treatment and observation. It was while there that, on July 17, 1944, certain naval doctors erroneously changed his diagnosis from Hodgkin's Disease, #1402, to Lymphadenitis Cervical, #1403. He was then discharged on August 3, 1944 as fit for all duty of his rate, at sea or foreign service. Previous to this he had been assigned to limited duty. Thereafter he was discharged from the United States Naval Service on October 23, 1945, having

been examined by naval doctors, and having been found at that time to have no defects other than defective sight and defective teeth. That the medical examination on discharge was erroneous for the court finds that at the time of his discharge and at the time his insurance lapsed, the insured was suffering from Hodgkin's Disease.

V.

That the said Allen Perry Donaldson was permanently and totally disabled for insurance purposes from the time of his discharge, on October 23, 1945, and further the court finds that at the time of his discharge and at the time his insurance lapsed, the insured had Hodgkin's Disease. That the said total and permanent disability was suffered by the veteran prior to the lapse of the insurance policy, which lapsed shortly after the time of his discharge, namely on December 6, 1945.

VI.

And further the Court finds that the fact that he was discharged as being fit in October, 1945 would give him cause to believe that he was all right, and having been recently married, that he was about to and could begin his career after discharge from the Service, and could with the natural determination that would exist in such a situation, overcome tremendous obstacles through sheer mental effort. And further the Court finds that this permanent disability for insurance purposes continued with varying degrees of acuteness from the time he was discharged to the time of his death in 1952.

VII.

And further the Court finds that because of the failure of the United States Navy to sufficiently examine the insured and its failure to properly diagnose the ailment of the deceased veteran at the time of his discharge in 1945, that said veteran was unaware of his fatal disease and had reason to believe that he was fit. This erroneous finding and pronouncement of the medical officer of the Navy of the insured's physical fitness, at the time of discharge on October 23, 1945, was a circumstance beyond the control of the insured and in itself probably accounted a large part for the determination of the young man to overcome whatever it was that was sapping his vitality and to cause him to fail to recognize that he was disabled, which resulted in his almost heroic efforts to take his place in life. That because of the failure of diagnosis of the disease and the resulting discharge as a fit person he was misled so that he did not make application for a waiver of premiums. The insured, because of this misleading circumstance, as the Court views it, had reason to believe that he was not totally disabled, and therefore did not conceive that he had the right to make application for the waiver of premiums. And further the Court finds that circumstances beyond his control were such as to cause him to fail to make timely application for waiver of premiums because of total disability at the time of the lapse of the policy, or at any time thereafter until his death. That there is nothing in the record that would make this veteran aware of total dis-

ability at the time of lapse of policy or before; and further there is nothing in the record to indicate that he was advised, or that he should have known, or that he actually knew, that he was continuously or totally disabled as of the date of the lapse of the policy, or any time prior to September, 1948. And further the Court finds that the circumstance beyond the insured's control is the circumstance of his discharge by the Navy as fit, after having been diagnosed previously as having Hodgkin's Disease. This finding is based upon the testimony of Dr. DeMarsh, and the medical records, namely, that he did actually have Hodgkin's Disease during all of this time.

VIII.

And further the Court finds as stipulated between the parties that the claim for reinstatement of the insurance policy of the deceased veteran by the plaintiff was treated by the Veterans Administration and processed by the Veterans Administration as a petition for reinstatement and for waiver of premiums.

That at the time of the death of the deceased veteran he was receiving one hundred (100%) per cent disability pension from the United States Government due to his service connected total disability, namely, Hodgkins Disease.

That due to the nature of the disease, and due to the error in diagnosis by the United States Navy, it was impossible for Allen Perry Donaldson to know his condition until some time after 1948, and therefore he was in no position, with respect to

knowledge, to file any premium waiver application.

That the deceased veteran's mother, who is the plaintiff in this action, heretofore filed a claim with the Veterans Administration, Washington, D. C., as principal beneficiary of the said insurance policy; that the claim was denied by the Disability Insurance Claims Division. That thereafter plaintiff duly and regularly filed a notice of appeal from this denial with the Board of Veterans Appeals, Veterans Administration, Washington, D. C. That said appeal was denied by the Board of Veteran Appeals in a letter addressed to the plaintiff September 14, 1953.

And further the Court incorporates and makes a part of its Findings all the Admitted Facts as agreed to by the parties in a pre-trial order filed herein and admitted as evidence:

Admitted Facts

1. That this Court has jurisdiction of the cause.
2. That the plaintiff is a resident of Snohomish County, State of Washington, Western District of the Northern Division.
3. That plaintiff is the mother of the deceased veteran, Allen Perry Donaldson.
4. That the said veteran died on March 24, 1952; and that Hodgkin's Disease was the cause of the death.
5. That the said deceased veteran applied for and was granted, on August 6, 1943, National Service Life Insurance Policy N-13 801 319; and that he was at said time a member of the United States

Naval Reserve, serving in an active duty status in the United States Navy.

6. That said veteran did designate his mother, Marguerite Allen Donaldson, plaintiff, as beneficiary of said policy; and that he did designate and name his father, William Nelson Donaldson, as contingent beneficiary.

7. That this policy was in the amount of \$10,000.00; and that the premium thereon was \$6.40 per month, payable monthly; and that premiums were paid thereon by deductions from the insured veteran's service pay until December 5, 1945.

8. That premiums were paid to December 5, 1945, and that there were no further premiums paid on said policy thereafter.

9. That the veteran insured, Allen Perry Donaldson, died on March 24, 1952.

10. That at the time of his death, said veteran had applied for and was receiving a pension based on a 100% disability, from the United States Government due to service connected total disability, to-wit: Hodgkin's Disease, which determination of disability was made effective September 7, 1948.

11. That the mother and plaintiff, who is the principal beneficiary of said policy on the life of said veteran, did file claim for benefits thereunder, as principal beneficiary of the policy, and that she did so on October 10, 1952.

12. That said claim was denied by the Disability Insurance Claims Division of the Veterans Administration of the United States of America; because the insurance was not in force on date of death,

having lapsed for non-payment of premiums due December 6, 1945.

13. That said mother and beneficiary who is plaintiff here did thereafter appeal the denial to the Board of Veterans Appeals, of the Veterans Administration, Washington 25, D. C., and that this appeal was also denied and notice given by aid of Board to plaintiff on September 14, 1953 by letter.

14. That Allen Perry Donaldson died on March 24, 1952, at 1:30 p.m. at the Veterans Hospital in Seattle, Washington, and that the cause of death, as shown by death certificate, as official record, was Hodgkin's Disease.

15. That the veteran was serving as a Coxswain aboard the U.S.S. "Breese," DM 18, a mine layer, in foreign waters, when a shipmate noticed a swelling on the left side of his neck on the 3rd day of September, 1943; and on that same date he was taken ashore to Overseas Base Hospital No. 3 for treatment and observation by a certain Doctor Willoughby.

16. That his condition on September 11, 1943, at said Overseas Base Hospital No. 3 was analyzed as Hodgkin's Disease, #1402 and he was classified as unfit for duty.

17. That on September 14, 1943, he was transferred to the Naval Hospital at Oakland, California for treatment and disposition; that at said hospital a biopsy was performed and analysis showed that there was an early Hodgkin's Disease for which X-ray treatments were given.

18. That in July, 1944, the veteran was admit-

ted to the United States Naval Hospital at Seattle; that on July 17, 1944 certain navy doctors changed his diagnosis from Hodgkin's Disease, #1402, to Lymphadenitis Cervical, #1403. "Reason: Error."

19. That on August 3, 1944, the veteran was discharged from said hospital as fit for all duty at sea or foreign service.

20. That on October 23, 1945 the veteran was examined and found to be physically qualified for discharge from naval service; and he was released to inactive duty; and that the only defects noted on his separation physical examination was "Defective vision—caries teeth."

21. That on or about September 7, 1948, approximately three years later, he applied to the Veterans Administration for treatment and was admitted for hospitalization; that a biopsy was performed and analyzed as Hodgkin's Disease; and thereafter there was intermittent hospitalizations and treatments as an outpatient; that said veteran was under the care of Dr. Q. B. DeMarsh, M.D.; that the severity of illness increased, and on October 19, 1951. the veteran was reported seriously ill.

22. That on March 18, 1952 the veteran was readmitted to Veterans Hospital at Seattle, Washington, with a diagnosis of Hodgkin's Disease, "condition serious."

The Court makes a further Finding of Fact in connection with the complaint in intervention that the attorneys of record for the plaintiff and the attorneys of record for the intervenor have agreed, in settlement of the dispute between them, that the

judgment entered in this action shall provide that the proceeds of the insurance policy sued on in this action shall be payable as follows, after deduction of attorneys' fees:

(a) Fifty per cent (50%) to Marguerite May Donaldson; and

(b) Fifty per cent (50%) to Elmira Donaldson Lucker, as guardian of her three minor children and for the use and benefit of said children, Allen P. Donaldson, Laird J. Donaldson, and Kaye Donaldson; that these payments under said policy shall be payable into the guardianship in the Superior Court of the State of Washington for King County, Cause No. 130706, in which Elmira I. Lucker has been appointed guardian of Allen P. Donaldson, Laird J. Donaldson, and Kaye Donaldson, and in which guardianship proceeding the guardian is under bond for \$6,000.00 and is required to report to the Veterans Administration once a year and to the Court once every two years as to the use of all funds in said guardianship, all of which funds are for the benefit of the aforementioned three minor children.

The Court, having made these Findings of Fact, hereby makes the following

Conclusions of Law

I.

That the plaintiff is entitled to judgment against the United States of America in the full amount of the policy, namely Ten Thousand (\$10,000.00) Dollars. That in accordance with a stipulation filed

of record herein by the Intervenor, Elmira Donaldson Lucker, the decree shall provide that judgment be paid in accordance therewith.

II.

That the deceased veteran, Allen Perry Donaldson, was permanently disabled for insurance purposes on the date of discharge from the Naval Service, namely, on October 23, 1945.

III.

That the deceased veteran, Allen Perry Donaldson, failed to apply for waiver of premiums on said policy due to circumstance beyond his control.

IV.

That according to the statutes and decisions pertaining hereto, attorney fees for the plaintiff's attorney, John F. Dore, should be allowed in the amount of One Thousand (\$1,000.00) Dollars, payable forthwith to him from the judgment decreed.

Done in Open Court this 27th day of March, 1956.

/s/ WILLIAM J. LINDBERG

Judge

Presented by:

/s/ JOHN F. DORE

Attorney for plaintiff

Approved only as to Form:

/s/ JOHN A. ROBERTS, JR.

Assistant United States Attorney
Of Counsel for defendant

Approved: 3/21/56.

CLARKE, CLARKE & ALBERTSON
/s/ FRED C. CLARKE, JR.

Attorneys for Intervenor

[Endorsed]: Filed March 27, 1956.

United States District Court, Western District
of Washington, Northern Division

No. 3760

MARGUERITE ALLEN DONALDSON,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

FINAL DECREE

This Cause having been heard in open court; and the Findings of Fact and Conclusions of Law having been made and filed herein; the files and records having been considered herein; and counsel for both the plaintiff and defendant having been heard, it is hereby

Ordered, Adjudged and Decreed:

I.

That the policy be reinstated and that the plaintiff beneficiary be awarded judgment in the full amount of the policy, namely Ten Thousand (\$10,000.00) Dollars, and that said amount shall be paid forthwith in accordance with the terms of the policy as follows: After deduction of attorney's fees:

(a) Fifty per cent (50%) to Marguerite May Donaldson; and

(b) Fifty per cent (50%) to Elmira Donaldson Lucker, as guardian of her three minor children and for the use and benefit of said children, Allen P. Donaldson, Laird J. Donaldson, and Kaye Donaldson; that these payments under said policy shall be payable into the guardianship in the Superior Court of the State of Washington for King County, Cause No. 130706, in which Elmira I. Lucker has been appointed guardian of Allen P. Donaldson, Laird J. Donaldson, and Kaye Donaldson, and in which guardianship proceeding the guardian is under bond for \$6,000.00 and is required to report to the Veterans Administration once a year and to the Court once every two years as to the use of all funds in said guardianship, all of which funds are for the benefit of the aforementioned three minor children.

II.

That from this judgment the attorney for the plaintiff, John F. Dore, shall be allowed attorney fees in the amount of One Thousand (\$1,000.00) Dollars. That said attorney's fee shall constitute a lien upon the funds to be derived from the policy until said fees are paid.

Done In Open Court this 27th day of March, 1956.

/s/ WILLIAM J. LINDBERG,
Judge

Presented by:

/s/ WILLIAM MULLEN,

/s/ JOHN F. DORE,

Attorneys for Plaintiff

Approved as to form:

/s/ JOHN A. ROBERTS, JR.,
Asst. U. S. Attorney,
Of Counsel for Defendant

Approved 3/21/56:

CLARKE, CLARKE &
ALBERTSON,
/s/ FRED C. CLARKE JR.,
Attorneys for Intervenor

[Endorsed]: Filed and Entered Mar. 27, 1956.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

The defendant, United States of America, by its attorneys below named, move the Court that the judgment entered herein be vacated, set aside, and that a new trial be granted upon the following grounds and causes materially affecting the substantial right of the defendant.

(A) Errors in Law Occurring at the Trial as Follows:

1. The Court erred in finding that the insured, Allen Perry Donaldson, was permanently and totally disabled for National Service Life Insurance purposes at the time his insurance lapsed for non-payment of premium due on December 6, 1945.

2. The Court erred in finding that circumstances beyond his control prevented Allen Perry Donaldson from making application for waiver of premiums after September, 1948, and prior to his death.

3. The Court erred in concluding that Allen Perry Donaldson's National Service Life Insurance was in full force and effect on the date of his death and that judgment should be entered against the defendant herein.

(B) Newly Discovered Evidence Material to the Defendant's Case Which Could Not Have, With Reasonable Diligence, Been Discovered and Produced at the Trial.

This motion is based upon the files and records of the case and the affidavit of John A. Roberts, Jr., attached hereto and by this reference made a part hereof.

/s/ CHARLES P. MORIARTY,
United States Attorney

/s/ JOHN A. ROBERTS, JR.,
Asst. United States Attorney

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION
FOR A NEW TRIAL

United States of America,
Western District of Washington,
Northern Division—ss.

John A. Roberts, Jr., being first duly sworn, on oath deposes and says:

That he is an Assistant United States Attorney for the Western District of Washington, of counsel for the defendant herein, and as such states as follows:

That the record of this case clearly demonstrates that all evidence relating to the health and physical well-being of the insured, Allen Perry Donaldson, at the time of his discharge from the United States Navy, and at the time of the lapse of his National Service Life Insurance for non-payment of premium due on December 6, 1945, was completely normal, and that he exhibited and showed no signs of physical defects. The evidence further demonstrates that he was able at that time, and later, to secure and follow gainful employment. The record shows that it was not for a period of three years following the date of his discharge that the insured found it necessary to consult medical experts concerning his condition. Affiant states that such a record does not support the Court's findings as to total disability within the meaning of well-defined case law on the subject and as cited in the defendant's trial memorandum.

Your affiant further states that he believes the record of the trial of this action clearly demonstrates that in September of 1948 the insured, Allen Perry Donaldson, knew that he then had Hodgkin's disease and that he had originally contracted that disease while in the service of the United States Navy, in 1943. The evidence shows that at that time he gave a full Power of Attorney to the Veterans of Foreign Wars to prosecute his claims against the Veterans Administration. The evidence shows that while many claims in his behalf were filed with the Veterans Administration by the Veterans of Foreign Wars, the record is absolutely

silent as to any application made for waiver of premiums on the insured's National Service Life Insurance or for reinstatement of same.

Your affiant further states that on the day preceding the commencement of the trial of this action, he telephoned Elmira Donaldson Lucker, former wife of the deceased, insured Allen Perry Donaldson. Affiant states that the nature of the call was to determine whether or not Mrs. Lucker would appear as a witness for the plaintiff. Affiant states that Mrs. Lucker advised that she knew nothing whatever of the impending trial and that she desired to seek advice as to what rights, if any, she had in the action. On being so advised, your affiant did not feel it ethically proper to discuss the merits of the litigation with Mrs. Lucker and promptly advised her to contact private counsel in her behalf.

Affiant further states that at no time prior to nor during the trial did your affiant have an opportunity to discuss the case with Mrs. Lucker inasmuch as she was then represented by private counsel.

Thereafter, the records indicate that Mrs. Lucker made application for leave of the court to file a complaint in intervention. In furtherance of her application, Mrs. Lucker, on her oath, made her affidavit in furtherance of her motion for leave to file a complaint in intervention, Document No. 19 of the Court file. A copy of Mrs. Lucker's affidavit is attached hereto marked Exhibit A and by this reference made a part hereof as though fully set forth herein. Your affiant believes that the sworn statements contained therein constitute irrefutable

evidence of declarations or admissions against interest made by Allen Perry Donaldson concerning his National Service Life Insurance, to-wit, why he did not make application for waiver of premiums after September, 1948. Your affiant further states that a part of the record of this action is the application in furtherance of Intervenor's motion to intervene, Document No. 18 of the Court file, and to file her complaint in intervention and affiant, by this reference, incorporates herein as though fully set forth, paragraph IV and V thereof, being the verified allegations of Elmira Donaldson Lucker concerning knowledge conveyed to her by her husband with reference to his National Service Life Insurance and his intents concerning same after September of 1948.

/s/ JOHN A. ROBERTS, JR.

Subscribed and sworn to before me this 6th day of April, 1956.

[Seal] /s/ J. THORNBURGH,
Deputy Clerk, United States District Court, Western District of Washington, Northern Division.

EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF COMPLAINT IN INTERVENTION

State of Washington,
County of King—ss.

Elmira Donaldson Lucker, being first duly sworn on oath deposes and says as follows:

That on October 14, 1944, she was married to Allen Perry Donaldson, then in the United States Navy. That shortly prior to this time, he had been ill, which illness was diagnosed as Hodgkin's Disease. That in the summer of 1944, he had a physical recheck by the Navy at Sand Point and was given a clear bill of health and advised that he did not have Hodgkin's Disease; that since he was apparently all right physically, your affiant and Allen Perry Donaldson were married on October 14, 1944.

That in early 1945, Marguerite May Donaldson, the mother of Allen Perry Donaldson, advised him, in the presence of affiant, to change the beneficiary on his National Service Life Policy to your affiant, and Allen Perry Donaldson at that time expressed his intention to change the beneficiary to your affiant. In October of 1945, when her husband, Allen Perry Donaldson, was discharged from the Navy, apparently with a clean bill of health, he again advised her of his intention that she be the beneficiary under his National Service Life Policy.

That in September 1948, when her husband, after re-diagnosis at the Veterans Hospital at Vancouver, Washington, was advised he had Hodgkin's Disease, he again expressed his intention of rechecking his National Service Life Policy rights to back pay and total disability; and both he and his father, while residing at 1113 Aurora Avenue, the home of his parents, stated to her, in the presence of the plaintiff, Marguerite May Donaldson, that they were going down to the VFW to check rights to insurance, changing the beneficiary to her for the benefit of the

children, rights to back pay and rights to total disability. That in September of 1948, in furtherance of this, Allen Perry Donaldson executed a Power of Attorney to the VFW, Form P22, on September 22, 1948, to do all things possible for him in this connection. That at this time, her husband advised her that there was nothing further he could do; that suit would have to be brought after his death to determine the questions in connection with the insurance.

That in June of 1949, her husband, Allen Perry Donaldson, at a time when they were living on Queen Anne Hill, again stated to her that he was going to check with the VFW in connection with the insurance, and advised her that there was no change in the status; that it was his understanding that suit would have to be brought after his death.

That her husband, Allen Perry Donaldson, the insured in the policy in question, was bed-ridden in bad shape from October 1951 until his death March 24, 1952, at which time, they were living at Alderwood Manor. That on more than one occasion, while he was bed-ridden, in the presence of your affiant and his mother, the plaintiff in this action, and his father, he expressed the desire that suit be brought on the insurance after his death and also the further desire that it be certain that the wife and children receive the proceeds of the insurance if the suit were successful; that both the plaintiff, Marguerite May Donaldson, and her husband, in the presence of Allen Perry Donaldson, and in the presence of your affiant, on these occasions, advised him

not to worry; that this would be done and the matter taken care of; that on or about March 24, 1952, your affiant and the plaintiff, Marguerite May Donaldson, and her husband, went to the Veterans Hospital in connection with the death of her husband, Allen Perry Donaldson; that at that time, the husband, Mr. Donaldson, in the presence of the plaintiff, Marguerite May Donaldson, and your affiant, stated that he was going to take care of the insurance personally and see that the wife and children were taken care of; that later on that date, March 24, 1952, the date of the death, and after the death of Allen Perry Donaldson on that date, the plaintiff in this action, Marguerite May Donaldson, stated to your affiant that they were going to bring an action on the insurance policy and see to it that your affiant and the children obtained the proceeds of the policy if the suit was successful.

Again, in April of 1952, the plaintiff in this action, Marguerite May Donaldson, stated to this affiant that she had received a denial of the insurance claim from the Veterans Administration and stated that action would be brought and that the wife and children would get the benefits of the insurance if the action was successful. That your affiant in July 1953, advised the plaintiff in this action, Marguerite May Donaldson, and her husband, that she was going to marry one George Lucker; that the plaintiff and her husband objected, thinking that this would give up certain rights that the children had through Social Security and the Veterans Administration; that the marriage to George Lucker took place Au-

gust 21, 1953; that no benefits were lost for the minor children of your affiant and her deceased husband, Allen Perry Donaldson, since the children were not adopted by her husband, George Lucker, so that these benefits still could be received. That from the date of the marriage to George Lucker, August 21, 1953, until about October 1955, your affiant saw very little, if anything of the plaintiff, Marguerite May Donaldson, and her husband, Mr. Donaldson. That in October of 1955 and Christmas of 1955, this affiant took the three minor children of herself and her deceased husband, Allen Perry Donaldson, to the home of his parents; that on these two occasions, nothing was said about the insurance claim. That your affiant next talked to the plaintiff in this action, Marguerite May Donaldson, on the telephone on or about January 17, 1956, discussing the children and a nephew. That the insurance and suit on the insurance was not discussed.

That on January 18, 1956, for the first time, your affiant heard about the pendency of the action on the insurance policy through an FBI agent calling on behalf of attorney John Roberts who was defending the action, who asked her if she knew about the suit on the insurance policy by the plaintiff in this action. She said she did not. Later on that same day, attorney John Roberts called her and said that he assumed she would appear as a witness in the trial in connection with the suit on the policy which was to be 1:00 P.M. on January 19, 1956; that your affiant was very surprised and she immediately on that same date endeavored to call the plaintiff in

this action, Marguerite May Donaldson; that the phone was disconnected and she accordingly drove out to the home of the plaintiff and her husband at Alderwood Manor; that she advised the plaintiff she had heard about the suit on the insurance policy and the fact that the trial date was 1:00 P.M. January 19, 1956, the next day. Your affiant asked the plaintiff if she remembered Allen's desire in connection with the insurance proceeds that they should go to her for the benefit of the children; the plaintiff stated that she did remember; your affiant then asked her "have you decided what you are going to do with the money if the suit on the policy is successful?"; that the answer to this question was evasive and plaintiff stated that there had been no decision made, and that the matter had not even been discussed, and also stated that she did not know the exact time of the trial and endeavored to change the subject.

That your affiant, immediately upon finding that apparently the situation was not as she thought it was and that the wishes of her deceased husband were not going to be carried out, immediately called the Veterans Administration attorney, Mr. Lester Pope, and explained the situation; that he advised the time was short and to contact an attorney; that she also called United States District Attorney John Roberts, defending this matter. He also said that the time was short. Your affiant then called attorney Fred G. Clarke, Jr., of Clarke, Clarke & Albertson, on the morning of January 19, 1956; that he accordingly prepared a Motion to Intervene

and a Complaint in Intervention and appeared in Court at 1:00 stating the position of your affiant and filed a Motion for Intervention and Complaint in Intervention.

ELMIRA DONALDSON LUCKER

Acknowledgment of Copy Received Attached.

[Endorsed]: Filed April 6, 1956.

—

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

This matter having come on duly and regularly for hearing before the undersigned Judge of the above entitled court upon motion of the defendant, United States of America, for a new trial, it appearing that heretofore judgment was entered duly and regularly against the defendant; plaintiff appearing through her attorneys, Yothers, Luckers, Harris & Dore, and William H. Mullen, of counsel, defendant appearing by John A. Roberts, Jr., Esq., Assistant United States Attorney; argument of counsel being had, and the court being fully advised in the premises, now therefore, it is hereby

Ordered that the motion of defendant for a new trial be and the same is hereby denied.

Done In Open Court this 7th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge

Presented by:

YOTHERS, LUCKERATH,
HARRIS & DORE,
/s/ By WILLIAM H. MULLEN,
Attorneys for Plaintiff

Approved as to form:

CHARLES P. MORIARTY,
/s/ By JOHN A. ROBERTS, JR.,
Assistant United States Attorney

[Endorsed]: Filed and Entered May 7, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Marguerite May Donaldson, and to Yothers,
Luck Rath, Harris & Dore, her attorneys.

Notice Is Hereby Given that defendant herein,
United States of America, hereby appeals to the
United States Court of Appeals for the Ninth Cir-
cuit from that judgment entered in the above-enti-
tled cause on the 27th day of March, 1956.

Dated this 5th day of July, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney
/s/ JOHN A. ROBERTS, JR.,
Assistant United States Attorney

[Endorsed]: Filed July 5, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith the following original papers in the file dealing with the action, as the record on appeal to the United States Court of Appeals at San Francisco, said papers being identified as follows:

1. Complaint, filed Aug. 10, 1954.
2. Marshal's Return on Summons, filed Aug. 12/54.
3. Answer of Defendant filed 2/15/55.
4. Reply, filed 6/15/55.
5. Praecipe, Ptff, for subpoenas in blank, filed 1/16/56.
6. Praecipe, Govt., for subpoenas, Williams, et al., filed 1/17/56.
7. Plaintiff's Memorandum, filed 1/17/56.
8. Defendant's Trial Memorandum, filed 1/18/56.
9. Marshal's Return on subpoenas, DeMarsh and Grobe, filed 1/19/56.
10. Marshal's Return on subpoena, Youngkin, filed 1/19/56.

11. Marshal's Return on subpoenas, Wilson, et al., filed 1/19/56.

12. Ptff's Supplemental Memo, filed 1/19/56.

13. Pre-trial order, filed 1/19/56.

14. Motion Elmira Donaldson Lucker to Intervene, filed 1/20/56.

15. Marshal's Return on Subpoena, Hall, filed 1/24/56.

16. Plaintiff's Brief in Summation, filed 1/30/56.

17. Defendant's Brief in Summation, filed 2/1/56.

18. Application in Furtherance of Intervener's Motion to Intervene and file Complaint in Intervention, filed 2/14/56.

19. Affidavit in Support of Complaint in Intervention, filed 2/14/56.

20. Memo. of Authorities and Brief State of Written Argument on behalf of Intervenor's Complaint in Intervention, filed 2/14/56.

21. Order Authorizing Intervention, filed 2/27/56.

22. Complaint in Intervention, filed 2/27/56.

23. Proposed Changes and Corrections Suggested by USA in Lieu of Findings and Conclusions Prepared by Plaintiff, filed 2/27/56.

Findings of Fact and Conclusions of Law proposed by Plaintiff, Lodged February 27, 1956.

Final Decree proposed by Plaintiff, lodged 2/27/56.

24. Answer to Complaint in Intervention, filed 3/9/56.

25. Motion to Dismiss Complaint in Intervention, filed 3/10/56.

26. Motion Plaintiff to Enter Judgment in Accordance with Decision of the Court.
27. Motion to drop Party Plaintiff, filed 3/13/56.
28. Motion Plaintiff to Dismiss, filed 3/13/56.
29. Stipulation of Settlement between Plaintiff and Intervenor and Order Dismissing Complaint in Intervention, filed 3/19/56.
30. Assignment, National Service Life Ins. Benefits, filed 3/23/56.
31. Findings of Fact and Conclusions of Law, filed 3/27/56.
32. Final Decree, filed 3/27/56.
33. Motion Defendant, for New Trial, filed 4/6/56.
34. Memorandum in Support of Motion for New Trial, filed 5/1/56.
35. Plaintiff's Memo of Authorities, filed 5/3/56.
36. Order Denying Motion for New Trial, filed 5/7/56.
37. Notice of Appeal by defendant, filed 7/5/56.
38. Motion Deft, to extend time to docket appeal, filed 7/25/56.
39. Order Extending Time to File Record on Appeal to 10/3/56, filed 7/25/56.
- 40-41. Court Reporter's Transcript of trial proceedings, filed 9/18/56.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal herein, to-wit:

Filing Notice of Appeal, \$5.00; and that said amount has not been paid to me for the reason that

the appeal herein is being prosecuted by the United States of America.

Witness my hand and official seal at Seattle this 28th day of Sept., 1956.

[Seal] MILLARD P. THOMAS,

Clerk,

/s/ By TRUMAN EGGER,

Chief Deputy

[Title of District Court and Cause.]

TRANSCRIPT OF TRIAL PROCEEDINGS

had in the above-entitled and numbered cause, before The Honorable William J. Lindberg, a United States District Judge, at Seattle, Washington, commencing at 2:00 o'clock, p.m., on the 19th day of January, 1956. [1]*

* * * * *

MARGUERITE MAY DONALDSON

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: State your full name, please.

The Witness: Marguerite May Donaldson.

The Clerk: Marguerite, spelled M-a-r-g-u-r-i-t-e (spelling)?

The Witness: M-a-r-g-u-e-r-i-t-e (spelling). [16]

* * * * *

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Marguerite May Donaldson.)

Cross Examination

* * * * *

Q. (By Mr. Roberts): I will ask you, Mrs. Donaldson, if after 1948 if you knew that your son had Hodgkin's disease?

A. I didn't know it, no. I am not a doctor.

Q. What I mean is, you had knowledge that that was the diagnosis?

A. After it was diagnosed, of course.

Q. Do you recall after he was out of service do you recall the circumstances when you first learned it was diagnosed as Hodgkin's disease?

A. What circumstances do you mean? [49]

Q. How did that knowledge come to you?

A. They told me.

Q. Did your son tell you? A. Of course.

Q. And you earlier testified that—this may be hard—but that disease to your understanding is fatal? A. Always.

Q. Did you ever learn that from your son?

A. I learned that from doctors and my son, yes; he told me. [50]

WILLIAM NELSON DONALDSON

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name, please.

The Witness: William Nelson Donaldson.

(Testimony of William Nelson Donaldson.)

Q. (By Mr. Dore): State your full name, please, Mr. Donaldson. A. William Nelson Donaldson.

Q. And where do you live, sir?

A. Route 2, Box 262, Alderwood Manor, Washington.

Q. And you are the husband of Mrs. Donaldson who just testified in this Court? A. I am.

Q. And what is your relationship to Allen Perry Donaldson, the deceased veteran in this case?

A. His father. [54]

* * * * *

Q. How long was he at that hospital, if you recall?

A. '44; let's see, the war ended in '45. He wasn't there too long because he was sent to limited duty for six months and then he came back. [59]

Q. How did that happen?

A. They rediagnosed his case out there. [60]

* * * * *

Q. How did he appear at times?

A. At times fine and at other times he would get irritable streaks and he would have headaches. They were periodical. They were not continuous but he would have those.

Q. Were they mild or severe?

A. Sometimes very severe from all appearances.

Q. Did you notice anything about his glandular system?

A. Yes, I did. I tried to talk Allen into turning in, in about what must have been two years before he turned into Vancouver in 1948. At times his

(Testimony of William Nelson Donaldson.)

glands in his neck were swollen and the glands under his arms and finally I persuaded him later on in 1948 to go down to Vancouver. Well, always he complained he had his family and insisted he was feeling fine but we knew he wasn't feeling fine and I guess he was just stubborn, if you want to put it that way.

Q. Did the swellings cause him any trouble? [65]

A. They caused him trouble to the extent he was unwell, and he still had these headaches. In the actual swelling of the glands, I don't believe he had any pain in those places but he would get awfully tired. He would get awfully tired. [66]

* * * * *

Q. Any other jobs that you recall? Well, let's move on. Finally, it is shown in the record that has been stipulated to here, your son became ill again, did he not? A. I beg pardon?

Q. Your son became ill again so that he had to be hospitalized? A. Yes.

Q. And at that time what was his appearance and physical demeanor?

A. Very, very poor. His glands were badly swollen. I had to almost force him to go to Vancouver. At that time the Vet's hospital wasn't open here and he had to go down there.

O. And was there a reanalysis?

A. He was so bad that the Vet's hospital said they couldn't take him for a month or six [79] weeks and he was so bad I went to the Veterans

(Testimony of William Nelson Donaldson.)
of Foreign Wars and they immediately——

Mr. Roberts: (Interposing) Objection.

The Witness: I think that will be hearsay testimony.

The Witness: I am telling you what I did.

Mr. Roberts: What you did, sir?

The Witness: Yes, what I did.

A. (Continuing) I went to the Veterans of Foreign Wars, to the relief officer, Walter Debach, and said, "This boy is awfully sick", and I said, "They tell him he can not get into the hospital for one month or two months it is so crowded." Then he checked and we got him in down there in a week's time.

Mr. Roberts: Down where?

The Witness: Into Vancouver.

Q. (By Mr. Dore): Vancouver, Washington?

A. That is right. That is the time they rediagnosed his case by biopsy *has* Hodgkin's again and reestablished the original diagnosis.

Q. Did you see the boy after that?

A. Oh, yes. He was down there on that [80] trip I think three or four weeks. They gave him treatment in Portland. [81]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Roberts): Mr. Donaldson, you stated, I believe, that after your son's discharge from the Service a period of time went by and then he got progressively worse to the extent that you insisted he go to a doctor and even had to go to the

(Testimony of William Nelson Donaldson.)

V.F.W. to get permission to go to the Veterans Hospital; is that correct? A. That is correct.

Q. That was sometime in 1948?

A. It was in 1948 when we finally convinced him that was what he had to do.

Q. So that a period of a little over three years elapsed from the actual date of discharge until he went to the doctor?

A. That is true. In the meantime I tried very hard to get him to go down there.

Q. I appreciate that; now, at or about the time he first went into the hospital there, and I [92] think as a result of your efforts probably in contacting the V.F.W., your son applied for disability pension as soon as he learned he had Hodgkin's disease, did he not? A. That is correct. [93]

* * * * *

Q. Now, Mr. Donaldson, after the disability award was made your son had to make further [97] applications as time and years went on to secure additional increases in the compensation, did he not, because of additional periodic increase or progression of his disease? A. That is right.

Q. And you, in effect, assisted him in that regard, did you not? A. I did.

Q. And counseled him concerning it?

A. That is right.

Q. At one point, also after September 1948, he went so far as to apply for vocational training with the Veterans Administration for the purpose of trying to learn the mechanical trade and was

(Testimony of William Nelson Donaldson.)

actually going to go to work for Vic Markov at one time? A. That is right.

Q. And went to work for Universal Food?

A. He did.

Q. And he tried to better his status?

A. He did.

Q. And he did have quite a number of contacts with the Veterans Administration after 1948?

A. Yes, I believe he did.

Q. And as you testified he was receiving [98] disability as a triple amputee finally at the date of death, or just prior to that time?

A. That is right.

Q. During all this period and up before a reasonable time before his death there was never any question as to his mental awareness, or his ability—his sanity, put it that way? He knew the different between right and wrong and all that?

Mr. Dore: I will object to this as a triple question.

The Court: The Court will sustain objection as to form.

Q. (By Mr. Roberts): (Continuing) I will ask you this, Mr. Donaldson:

There was never any question as to whether your son was ever insane? A. No.

Q. As a matter of fact, he was mentally competent, was he not, up until a reasonably short period of time before the disease crippled him?

A. Yes, up until the time they kept him under opiates, I will say that.

(Testimony of William Nelson Donaldson.)

Mr. Roberts: Yes. I have no further questions.

Redirect Examination

Q. (By Mr. Dore): When was that, Mr. Donaldson?

A. Well, I believe they were giving him opiates several weeks before he died, as I recall.

Mr. Dore: I have no further questions.

(Witness excused.)

Mr. Dore: I will call Dr. DeMarsh, please. [100]

QUIN B. DeMARSH

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Quin B. DeMarsh, D-e-M-a-r-s-h (spelling). * * * * *

Q. (By Mr. Dore): What is your profession?

A. I do internal medicine and hematology. [101]
* * * * *

A. He was in the hospital two months before his discharge. He did not feel well in January of 1949 so he had apparently a reasonably good clinical remission for two years. In other words, to January, 1948.

Q. Is that unusual?

A. No. No, the only unusual thing about Allen is that most people with Hodgkin's disease do not have a remission—that is, from 1943 to 1947—of

(Testimony of Quin B. DeMarsh.)

five years. That is unusual. I have a patient, however, with the same disease who had—with surgical removal and treatment who had—a remission of about eighteen years before the disease again became apparent. She was observed for a time and then nobody paid any attention until about eighteen years later the disease started up again and the diagnosis was reaffirmed. That is an extreme. A five year remission after treatment I would say is unusual but not rare. [114]

Q. And then, after that remission, what occurred to him, according to the records?

A. Then he started to get into more and more trouble. In June, 1948, when I saw him he had headaches for several months and a bloody nasal discharge and many canker sores in his mouth and a poor appetite and lost weight. He had some sense of pressure in the upper chest, chronic cough in the morning with thick, mucus discharge or sputum, a little burning on urination and pain in the left thigh which awakened him at night.

Hodgkin's disease after a certain length of time—it will be confined in one area for maybe several years and then start to disseminate and then they develop generalized findings and symptoms of this disease.

Q. And was that happening to Allen?

A. Yes, he had a classical course for this disease and I saw him very frequently then after that time. [115]

* * * * *

(Testimony of Quin B. DeMarsh.)

Q. Doctor, I think you wanted to make some correction there for the record?

A. Yes. I saw him first six-twenty-nine-forty-nine (6/29/49), rather than 1948. In the history given me he went back to the Veterans' Administration in August, 1948, when he noticed this [119] lump under the left arm rather than 1947. [120]

* * * * *

Q. (Continuing) Considering the history and record as you have given it medically and as you observed it in the official records of the trial and of your own records pertaining to this certain case, and considering the work record which we will—which we shall not repeat—do you have an opinion based on some reasonable medical certainty from your examination and study of the case as to what in your opinion would be the disability, or the nature of the disability, of a person surrounded by such facts and circumstances?

A. Well, now——

Mr. Roberts: (Interposing) Objection.

The Court: Objection overruled. First, do you have an opinion?

The Witness: I have an opinion.

Q. (By Mr. Dore): What is that opinion?

A. My opinion—I would like to couch the question a little as to a hypothetical question concerning anybody with Hodgkin's Disease; they are, in essence, completely and totally disabled. Now, they have periods during the course of their disease [129] in which they are not. In fact, they feel well.

(Testimony of Quin B. DeMarsh.)

Mr. Roberts: Well, I object to the Doctor's answer and respectfully move it be stricken and request he answer the question as posed.

The Court: I will overrule the objection.

A. (Continuing) As it applies to this particular case, this boy does show what you would anticipate with a diagnosis of this disease. He had periods in which he was partially and also completely and totally disabled and certainly for the last three or four years of his life he was essentially completely and totally disabled. He couldn't hold a job and that is what you would anticipate. Also what you would anticipate, periods preceding the physical evidence of the disease, they have periods in which they don't feel well. You can not find very much to substantiate that period of disability and then in a few weeks or months out comes the evidence of the disease. That is my idea of the answer to the hypothetical question and also as it applies to this individual because he followed the typical course of this disease with the exception of a long remission originally. [130]

Mr. Dore: Any questions, Mr. Roberts?

Mr. Roberts: Yes, I have one or two, Mr. Dore. Have you completed?

Mr. Dore: I think I have. Go ahead.

Cross Examination * * * * *

Q. (By Mr. Roberts): Your testimony is then that with relation to Hodgkin's Disease as it runs its course there may be periods of total disability and other periods of partial disability?

(Testimony of Quin B. DeMarsh.)

A. That is correct. [131]

* * * * *

The Court: Would you say this, Doctor:

That a person afflicted with Hodgkin's disease is totally disabled?

The Witness: You mean the day you make the diagnosis?

The Court: No, when you conclude that; after you reach that diagnosis?

The Witness: You know he is disabled because of what is going to happen to him. He may be perfectly healthy. I have a number of people with Hodgkin's disease working every day. I have two or three at the Boeing Aircraft Company—engineers. They are working every day and they have [136] Hodgkin's disease. As a matter of fact, they feel fine but they are going to be partially disabled and then totally disabled and then dead. That is a foregone conclusion once the diagnosis is established. But, to say they are completely disabled from the day diagnosis is made until they are dead, that is not so, but you know they will as certain be. At the time you make the diagnosis many of them are in excellent health except they feel something in their neck or under their arm. Some of them actually when you make the diagnosis—we have such a patient, a young man who I believe is also at Boeing's, who was sick three or four months and his family physician didn't find much except fever and it was two months before anything came up that you could biopsy. His chest film was nega-

(Testimony of Quin B. DeMarsh.)

tive. I believe he developed an enlargement of his spleen. That man has been totally and continuously disabled from three months previous to the time the diagnosis was finally established and he remained disabled or maybe is dead. That is a period of over a year and the man has not worked a day. You have these extremes in which the diagnosis is present but it doesn't disable them too much at that moment, or it may not for three or four or five [137] and in some cases six years. That is the nature of the process.

I certainly—this boy was not disabled over a long period of time. It was not until 1945 or '6 that he began to have symptoms of recurrence and it was not until 1948 that he had objective evidence and a reestablishment of his diagnosis. From that time on the boy was, in my opinion, totally disabled.

The Court: From what time, Doctor?

The Witness: I would say sometime previous to 1948. That is a hard thing to pin down. His work record is poor and his work record in the Navy was poor. He apparently didn't feel well at that time but I have no personal knowledge of him at that time, nor did I take care of him. [138]

* * * * *

WILLIAM NELSON DONALDSON

upon being recalled as a witness for and on behalf of the Plaintiff, and having been previously duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Dore): Mr. Donaldson, I believe I forgot to ask you this yesterday:

(Testimony of William Nelson Donaldson.)

To your personal knowledge did your son, Allen Perry Donaldson, ever make out an application for waiver of his insurance premiums on this policy?

A. No, he never did.

Q. To your personal knowledge did he ever endeavor to do so? A. Yes, he did.

Mr. Robert: Objection. The answer is "yes," I believe.

Mr. Dore: That is all he said.

The Witness: Yes.

Q. (By Mr. Dore): When and where was that done?

Mr. Roberts: I will object to the question unless proper foundation is laid as to who was present, the time, the place. [179]

* * * * *

Q. (Continuing) Who was present?

Mr. Roberts: Very well.

The Court: You are amending your question? All right, go ahead.

The Witness: Should I answer?

Mr. Dore: Yes.

The Court: Yes.

A. My son and myself, Allen and I both. After the disease was rediagnosed definitely as Hodgkin's I personally took the stand and I did some checking that he should have been entitled to reinstatement and waiver of premiums.

Q. (By Mr. Dore): What did you do?

Mr. Roberts: I will object to that as not being responsive. I hate to be so technical but the

(Testimony of William Nelson Donaldson.)

question asked for when and where and who was present at the time the application was made.

The Court: It was a preliminary statement. What is the basis of your objection?

Mr. Roberts: The answer not being [182] responsive.

The Court: Objection overruled.

Q. (By Mr. Dore, Continuing): And what did you do; where did you go?

A. We went up to the Veterans Administration.

Q. Where was that located?

A. I believe in the Arcade Building. I think at one time I was in the Exchange Building and at another time in the Arcade Building.

The Court: That means you and your son, Allen?

The Witness: That is right, your Honor.

Q. (By Mr. Dore): What occurred on those occasions?

Mr. Roberts: I will object to that. I don't know when it took place.

Q. (By Mr. Dore, Continuing): Well, can you set the time any more definitely, Mr. Donaldson, than as you have?

A. I can not. As to date and hour, that is impossible.

Q. But you do know it was after the last [183] diagnosis of Hodgkin's disease?

A. That is correct, very shortly after.

Q. And what authorities did you see in the Exchange Building and/or the Arcade Building at the time?

(Testimony of William Nelson Donaldson.)

A. We talked to whoever was in charge. I don't recall the name and they got out the book and we explained our situation to them and they got out and showed us that the waiver period had expired and that there was nothing we could do, and Allen accepted that at the time.

The Court: What was that?

The Witness: Allen accepted that statement at the time which I didn't.

Q. (By Mr. Dore): Did you later then make application?

A. Yes. I went to the Veterans of Foreign Wars who at that time had power of attorney for Allen's case.

Q. When was this now?

A. It was shortly after this period; it must have been in 1948 or '9.

Q. Was this after Allen died?

A. No, originally, and after Allen died I went to the Veterans of Foreign Wars and we filed [184] our claim, which was denied, and I still felt that we had a just claim and we appealed it and the claim was denied and also the appeal was denied, after which I still believed we had a claim and I consulted with yourself.

Mr. Dore: Any questions, Mr. Roberts?

Cross Examination

Q. (By Mr. Roberts): As I understand your testimony, Mr. Donaldson, you state that you and your son went to either the Arcade or Exchange Building sometime after the rediagnosis in 1948?

(Testimony of William Nelson Donaldson.)

A. That is right.

Q. You don't know who you talked with but you did talk with somebody?

A. That is right.

Q. And you were talking with somebody you believe in the Veterans Administration?

A. That is right.

Q. And you asked them about reinstating his insurance, is that right?

A. That is right, and waiver of premiums.

Q. And they advised you, whoever it was, you do not recall who it was, that he didn't have a right to reinstate? [185]

A. That is right.

Q. And that that was the last of it; that is, the last Allen ever did about it; is that correct?

A. To my knowledge, I think that is correct.

Q. And you can't help me any further in telling me who this party was?

A. No, I can't. At the time I didn't take name or dates or anything else at the time. We had to assume through—you might say through—ignorance of the law and such as that that such was the case. However, I had——

Q. (Interposing) Let me—I know you appreciate my problem as I appreciate yours. I have made the complete original file of the Veterans Administration's Office concerning your son available to you, haven't I?

A. That is correct.

Q. And you studied it over a period of two days, haven't you?

A. Yes. [186]

* * * * *

(Testimony of William Nelson Donaldson.)

Q. I will ask you, Mr. Donaldson, if you were able to find anything in this file concerning such a meeting? A. No.

Mr. Dore: I will object to that, your Honor.

The Court: Objection overruled.

Q. (By Mr. Roberts): Further, it is a fact, is it not, Mr. Donaldson, as you testified, that the Veterans of Foreign Wars during this period and before your son's death had a general power of attorney for him concerning his claims to the Veterans Administration? A. That is right.

Q. And you had occasion to go out and examine their files and records and to talk to their personnel in an effort to determine whether that [188] organization made any application for reinstatement or waiver of premiums; is that true?

A. It is not entirely true. I went to them. I don't know that there is any record made of it. I do know they looked it up in the regulations at that time. Whether anything was put down in writing or formal application made, I can't answer that. We weren't, you know, of a legal mind. As a consequence we went for information and if somebody told us something we had to accept it as being what it was.

Q. It is a fact at that time the Veterans of Foreign Wars were assisting Allen in his disability representations to the Government?

A. That is correct.

Q. At that time? A. That is right.

Mr. Roberts: I have no further questions.

(Testimony of William Nelson Donaldson.)

The Court: Mr. Donaldson, you state that this inquiry was made after the diagnosis—I mean, after the last diagnosis?

The Witness: That is correct, your Honor.

The Court: May I have the exhibit? [189]

The Witness: I might explain that, if I may.

(Whereupon, there was a brief pause.)

Mr. Dore: Will you mark that, please?

The Court: Counsel, I am referring to Exhibit A-2. That is the application for pension, or compensation because of disability. I am looking for the date.

Mr. Roberts: I have examined that for a date and don't find one. There are time stamps by offices on the back.

The Court: September; is that 1948, have you ascertained?

Mr. Roberts: That is correct, your Honor, 1948.

The Court: I am referring now, Mr. Donaldson, to this Veterans application for pension or compensation which is in the record as Plaintiff's Exhibit A-2. You have seen that, have you?

The Witness: No, I haven't, your Honor. I haven't seen the application. I believe at one time——

The Court: (Interposing) It bears date September 16, 1948. That was about the time that he went into the hospital and it was about that time [190] that this diagnosis——

The Witness: (Interposing) I believe it was

(Testimony of William Nelson Donaldson.)

executed while he was in the hospital at Vancouver, as I recall, for the rediagnosis his first trip.

The Court: Now, you state that the conference you had with the representative of the Veterans Bureau, or Department, or Administration, was after he returned from that hospitalization?

The Witness: Yes, your Honor.

The Court: Have you any way of relating it at all, whether it was within a year or two? Certainly there was some time between.

The Witness: Very shortly after he returned from the hospital at Vancouver. If I may go back, your Honor, I think maybe I can clarify it. I am inclined to be a little insurance minded because I sold insurance at one time. I assumed—we had to assume—during the period due to the change of diagnosis of his disease from Hodgkin's to lymphadenitis that he had no grounds for waiver. That is the argument I used with the Veterans Administration. They said, "Why didn't you come in?" If now it is determined it is one hundred per cent [191] fatal disease, there is no cure. They have periods of remission but to all intents and purposes, from an insurance standpoint, he was entitled to one hundred per cent disability and waiver of premiums on the original diagnosis. It wasn't his fault that the other doctors made an error in re-diagnosing his case. They said, however——

The Court: (Interposing) You say "they"; who?

The Witness: The people we were talking to in the Veterans Administration. The period had gone

(Testimony of William Nelson Donaldson.)

by where he could ask for a waiver. If I recall it correctly, you have one year to apply for that waiver. Well, during this period we didn't know, had no way of knowing, that we had any grounds to ask for a waiver and so, when it was rediagnosed and determined definitely he had Hodgkin's, and had had it originally, then I felt it should be retro-active to the original period and they told me no; and that has been my contention right from the start on through this thing. They apparently stood on a technicality.

The Court: Just a minute. We don't want "apparently"; what I want is what transpired, what you said. [192]

The Witness: This was a part of the conversation I had with the Veterans Administration. They then said, and read the memorandum to me, that that he had not applied within the stated period required.

Mr. Roberts: Your Honor——

The Court: (Interposing): You have no recollection or you can't identify this person?

The Witness: It would be utterly impossible, your Honor, no.

Mr. Roberts: I have to restate my objection. I appreciate the witness' difficulty in recalling but I believe the foundation is not properly laid and it should be more specific. There is no way that I can cross examine such testimony. There is no way I can identify the parties.

The Witness: I can identify the Veterans of

(Testimony of William Nelson Donaldson.)

Foreign Wars man I talked to on it; he is in the city.

The Court: This was a conversation you had with him with your son not present?

The Witness: My son was present, several times.

The Court: This was the Veterans of Foreign Wars? [193]

The Witness: Not it all, but when it concerns the Veterans Administration—

The Court: (Interposing) Do you have the place definitely in your mind, or not; the office?

The Witness: The Veterans Administration Office?

The Court: Yes.

The Witness: I am almost positive it was in the Arcade Building, but I wouldn't want to take a life and death oath on that, but I am quite sure it was in the Arcade Building.

The Court: You have no way of refreshing your recollection to identify the person, either by description—you, of course, don't know his name?

The Witness: No.

The Court: Or by description?

The Witness: Your Honor, I don't believe if he walked into this court room I could identify him.

The Court: Was that only one occasion?

The Witness: There was only one occasion up there.

The Court: You and your son together? [194]

The Witness: Yes, that is right.

(Testimony of William Nelson Donaldson.)

Mr. Roberts: May I ask one or two questions, your Honor?

The Court: Yes.

Mr. Roberts: It might clarify Mr. Donaldson's recollection.

Q. (By Mr. Roberts): Your son worked with a fellow by the name of—

Mr. Roberts: Strike that.

Q. (By Mr. Roberts, Continuing): —with a man by the name of Joseph A. Martino at the Veterans of Foreign Wars; do you recall the name of Joseph A. Martino?

A. Yes, I know him very well.

Q. He was a contact man at the Veterans of Foreign Wars? A. Yes.

Q. Isn't it a fact, Mr. Donaldson, that Mr. Martino got out the law book, so to speak, and read the regulation with you and that that is the meeting you are thinking about when you say you went over the law?

A. No, indeed not, it is not, because we went up there afterwards. I talked to Walter DeBach and [195] Walter read it to me and we undoubtedly had conferences with Joe Martino. I went up to the Veterans of Foreign Wars—well, let's put it—to seek more pressure.

Q. But they never did, apparently?

A. Just what they did, I don't know.

Q. To your knowledge?

A. They informed me that the waiver period had expired. [196] * * * * *

ELMIRA LUCKER

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Mullen): During that time was there any change in his physical condition?

A. No; just the same complaints except that [220] he was shaving one morning and noticed a big lump under his left arm and he immediately knew what that was.

Q. And then what did he do?

A. He called the Veterans Administration right away and they wanted him to file papers and they said it would take six weeks to get in the hospital and he went to the V.F.W. and they got him in the hospital the following Monday in Vancouver.

* * * * *

OPINION

The Court: Gentlemen, I think I can give you my decision on this.

To begin with, the Court is of the opinion that this a very close case, particularly in light of the recent decisions in the Landsman case and more particularly the Kershner case in our own circuit.

As I indicated at the outset of the argument this afternoon, the two principal issues to be resolved are, first, the total disability of the insured at the time the insurance lapsed and, second, whether or not his failure to make application for waiver of

premiums was due to some circumstance beyond his control. As I understand, both Counsel agree that those are the two critical or vital issues to be decided.

The Plaintiff can not recover unless there was total disability prior to the lapse of the policy which occurred shortly after the time of his discharge.

In reaching a decision on that matter the Court has taken into consideration the medical record which showed the diagnosis of Hodgkin's disease back in 1943; Dr. DeMarsh's testimony as to what the disease and its effects and course are; the work record of the insured or the deceased veteran; and, likewise, the definition as given in the Code of Federal Regulation, as well as the various opinions of the courts with respect thereto.

As best I can determine it, the insured was, for the purposes of continuous substantially gainful occupation, totally disabled at the time he was discharged from the Navy.

I find that at the time of his discharge and at the time his insurance lapsed, insured was suffering from Hodgkin's disease.

The disease itself, while it may not totally disable a person from working, is fatal and places serious handicaps on his employment. The course of the disease may run a matter of two, six, eight years; in this case nine years, approximately. The Doctor testified in a very unusual case to his knowledge a patient had lived eighteen years; further, that in this case the disease ran unusually long

course with an unusually long period of recession [283] after the initial diagnosis.

It appears to me that the work record here, while showing the young lad held down jobs it also indicates irregularity and lack of capacity.

It is the Court's opinion, from the testimony of the mother, the father, and the wife that the boy was not well from the time he came back after he was first diagnosed as having had Hodgkin's disease. The periods of time worked, including time lost, the mental and physical condition of the insured when he came home—that is, his exhaustion, headaches and irascibility—all those factors indicate to me that this boy, while determined to make a go of it, if possible, was working under handicaps that were, in fact, disabling.

The fact that he was discharged as being fit in October, 1945, would give him cause to believe that he was all right and a young man, recently married as he was and about to begin his career after discharge from the Service, could, with the natural determination that would exist in such a situation, overcome tremendous obstacles through sheer mental effort. Under the circumstances it is reasonable to believe he would not permit himself [284] to think he was suffering from a dreadful affliction such as Hodgkin's disease. The pattern of work indicates to me that he was afflicted with a disabling disease and that even though working with great courage he was, in fact, totally disabled from following for a period in excess of two or three months with efficiency any substantially gainful

occupation at the time his insurance lapsed, and, likewise, that this disability, with varying degrees of acuteness, continued in fact from that time to his death in 1952.

Now, the question of whether or not there was any circumstance beyond his control which caused him to fail to make timely application for waiver of premiums:

It is the Court's finding that because of the failure of the Navy to sufficiently examine the insured and diagnose the ailment of the diseased veteran Donaldson at the time of his discharge in 1945 that Donaldson was unaware of his fatal disease and had reason to believe that he was fit. The pronouncement of the medical officer of the Navy of the insured's physical fitness, understandable as it may be, was a circumstance beyond the control of the insured and in itself probably accounted in [285] large part for the determination of this young man to overcome whatever it was that was sapping his vitality and to cause him to fail to recognize he was disabled and resulted in his almost heroic efforts to take his place in life. Because of that failure in diagnosing the disease and the resulting discharge as a fit person it may be assumed he did not make the application for a waiver of premiums which, under the statute, should have been made if he were totally disabled sometime within a year from August, 1946. The insured, because of this misleading circumstance, as the Court views it, had reason to believe that he was not totally disabled and, therefore, did not conceive that he had the right to

make application for the waiver of premiums and I find, therefore, that circumstances beyond his control were such as to cause him to fail to make timely application for waiver of premiums because of total disability at time of lapse, or at any time thereafter until death.

The fact that he may have fully appreciated that he was totally disabled from 1948 on wouldn't, as I see it, necessarily make him aware of total disability at the time of lapse or before August, 1947, and there is nothing in the record to [286] indicate that he was advised that, or that he should have known that, he was continuously or totally disabled as of the date of the lapse or any time prior to September, 1948.

So, therefore, the Court finds for the Plaintiff.

Does that give you sufficient from which to make your findings?

Mr. Dore: Yes, your Honor.

Mr. Roberts: I was wondering, your Honor and Mr. Dore, I am not sure—maybe I missed some of the remarks of the Court relative to the period after September, 1948—I don't know if your Honor covered the circumstances beyond his control at that time.

The Court: The circumstances beyond control, as I find here, were the circumstances resulting from the Navy's failure to properly diagnose the insured's ailment which led him to be of the opinion that he wasn't suffering from Hodgkin's disease from the period of his discharge until the time he made application to the Veterans Hospital for

treatment when he did learn that he did have Hodgkin's disease. However, that was in October, or September, rather, of 1948 when time for making [287] application for waiver had expired unless he had been and knew he had been continuously and totally disabled at the time he left service or, rather, at the time of the lapse of his insurance.

Mr. Roberts: So, do I understand the Court, the Court does not feel it necessary to comment on whether or not the Defendant was entitled—the Plaintiff, rather—the insured was entitled to make application for waiver of premiums after September, 1948? It is my understanding of the law——

The Court: (Interposing) I think he was, under the law, entitled to make that application if he were totally disabled at the time of his discharge; but the Court's further finding is that the fact that he was found to have Hodgkin's disease in 1948 did not in and of itself make this insured aware of the fact that he may have been continuously and totally disabled at the time of his discharge, or lapse of his insurance, because he was discharged after medical examination by the Navy as being fit and he in his own mind may have therefore believed he was not totally disabled, whereas, in fact, he was.

I don't know whether you follow the [288] Court's reasoning or not.

Mr. Roberts: I wanted to clearly state it as I feel it should be.

The Court: I think it should be too.

Mr. Roberts: In other words, the application

made after September, 1948, would be an application for waiver of premiums due December 6, 1945?

The Court: 1945. There is nothing in the evidence, as I state, to indicate that this boy had been advised that this Hodgkin's disease totally disabled him as of the date of discharge; the evidence is to the contrary.

Mr. Roberts: Then as I understand the Court, the finding is that lack of knowledge of the totally disabling characteristics of Hodgkin's disease is a circumstance beyond the insured's control?

The Court: Well, no, the circumstance beyond the insured's control is the circumstance of his discharge by the Navy as fit after having been diagnosed as having Hodgkin's disease. The Court's finding that he had Hodgkin's disease throughout is based on the testimony of the Doctor DeMarsh and the medical records. However, the [289] Navy having found him fit discharged him and for a period of three years the insured went on making every effort to support himself and family without going to a doctor. Finally in 1948 when he had to see a doctor and learned of his disease, his insurance had lapsed. At that time he had no right to ask for waiver of premiums unless it could be shown that he was totally disabled at the time the insurance lapsed. As I have stated, it is only reasonable to assume that the lad did not know, was not aware of, his total disability and actually there is nothing in the evidence to indicate that he at that time knew that he had no chance of recovery. Maybe he was,

but there is nothing in the evidence to establish such knowledge.

Does that sufficiently cover it?

Mr. Dore: Yes, your Honor. Thank you.

The Court: I feel it is a rather close case, Gentlemen, but in view of the liberal decision of our Court of Appeals it seems to me that the Kershner case gives indication of the way this case should be decided. [290]

* * * * *

The Court: As I viewed it, in 1948 he finally said he was disabled or had Hodgkin's disease and probably would be all through, so to speak. There was indication, if anything, that—from testimony that may not have been stricken, that his efforts to reinstate his insurance, according to his father, as I recall, met with the response that it was too late or that it couldn't be renewed, or something of that character. I don't know how much of that testimony stayed in. That to me is a reasonable assumption to make from the facts that are established. The important thing is that when he could have renewed, he didn't have reason to believe— [346] at least that is the way I put it—that he was entitled to it. [347]

* * * * *

The Court: Well, this matter has been before the Court on several different occasions.

I recognize that the Court in this case has probably gone further than any other court in which a decision has been reported but I reached the decision following what I conceived to be the letter as

well as the spirit of the Kirshner case in this Circuit. [384]

* * * * *

[Endorsed]: Filed Sept. 18, 1956.

PLAINTIFF'S EXHIBIT No. 9

REPORT OF CONTACT

Date: 11-14-52

Name: Allen P. Donaldson. No. 14,494,247.

* * * * *

Give brief statement of information requested and given:

It is believed that the evidence of record meets the requirements of the National Service Life Insurance Act of 1940 as amended and waiver of Premiums is in order.

Kindly furnish our Organization with a copy of the notice of decision when rendered.

[In longhand]: No comment.

Filed 11-14-52.

/s/ [Illegible]

Ass't NCO V.F.W.

[Stamped]: Ready for File. Dis. Ins. Claims Div. Nov. 14, 1952. No ans. nec. J. C.

DEFENDANT'S EXHIBIT No. A-2

Cause No. 3760

Claim No. 14,494,247

Veteran's Application for Pension or Compensation for Disability Resulting From Service in the Active Military or Naval Forces of the United States

Penalties Provided in Public Acts Covering Pension and Compensation

The assignment or transfer of any right or interest in any pension is void and has no effect. Any person who shall pledge or receive a pledge covering the transfer of any right or interest in any pension, or who holds the same as collateral security for a debt, shall be guilty of a misdemeanor and upon conviction shall be fined a sum not exceeding \$100 and the cost of the prosecution.

Any person who knowingly or willfully makes or aids, or assists in the making or presentation of any false or fraudulent affidavit or writing purporting to be such, concerning any claim for pension, or any person who knowingly certifies that the declarant, affiant, or witness named in such declaration, affidavit, etc., appeared before him and was sworn thereto, when in fact such affiant or witness did not so appear, shall be punished by fine not exceeding \$500 or by imprisonment for a term of not more than 5 years.

Any fiduciary or other person having charge and custody in such capacity of the pension of his ward,

who shall embezzle the same or fraudulently convert the same to his own use, shall be punished by fine not exceeding \$2,000 or imprisonment at hard labor for a term not exceeding 5 years, or both, at the discretion of the court.

That whoever in any claim for benefits makes any sworn statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than 2 years, or both.

That if any person entitled to payment of pension, whose right to such payment ceases upon the happening of any contingency, thereafter fraudulently accepts any such payment, he shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than 1 year, or both.

While a claimant has a right, if he so desires, to employ a duly recognized pension attorney or pension claim agent to assist him in prosecuting his claim, it is not necessary that he incur this expense, and any attorney or agent so employed may not legally charge any fee other than that allowed and paid by the Veterans Administration.

Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in anywise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under this title, shall

forfeit all rights, claims, and benefits under this title, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both.

You must furnish all the information required in this application and every question must be answered fully and clearly. Answers must be written in a clear, legible hand or typewritten. If you do not know the answer to any question, say so. If any of the questions are not clear and you desire further information before attempting to answer the question involved, you should write to the Veterans Administration office having jurisdiction over the territory in which you reside for further instructions.

If you need more space to answer any items, attach a piece of plain paper numbering answers to correspond with the items.

Attach to this application any affidavits or papers which may help to show that you have a disability, resulting from military or naval service.

[Stamped in margin]: Military File searched
(v) Record found. Date 9/9/48. D. C. T.

I hereby make application for compensation or pension based on military or naval service.

1. Name—First name—Middle name Randson, Allen Perry		2. Address (Number, street, city or town, State) 16802-15th NE Seattle, Wash.	
3. Are you a citizen of the United States? Yes		4. Native-born or naturalized? Native born	
5. If naturalized, state date and place		6. If naturalized, state date and place	
7. Place of birth Duluth, Minnesota		8. Date of birth 11/4/20	
9. Description as of date of last enlistment			
9. Race White		10. Height 5'9 1/2"	
11. Weight 175 lbs.		12. Color eyes Grey	
13. Color hair Brown		14. Complexion Ruddy	
15. Mark with a cross (X) branches of service in which you served. <input checked="" type="checkbox"/> Navy <input checked="" type="checkbox"/> Marine Corps <input checked="" type="checkbox"/> Coast Guard <input checked="" type="checkbox"/> Nurse Corps <input checked="" type="checkbox"/> Other (specify) Reserve		16. Are you registered under Selective Service Act? (Yes or no.) No	
17. Address of draft board with which you registered. (If none, so state.)		18. Home address at time of registration	
19. Entered service 1941		20. Serial No. 664-00-5919045	
21. Separated from service Jan 4/ 1947		22. Grade and organization Submarine P.F.C. - USMC	
23. Character and type of discharge Honorable		24. If reservist, give periods of active duty and branch of service. USMC RN 17 Feb 6 1941 to 9 Mar 41 1947	
25. If reservist, give periods of active duty and branch of service. USMC RN 17 Feb 6 1941 to 9 Mar 41 1947		26. Do answers above cover all periods of your service—active, inactive, or reservist? (Yes or no.) Yes	
27. Have you ever applied for any of the following benefits? (Yes or no.) No		28. Have you ever been physically examined for the following? (Yes or no.) No	
29. Any of the answers under item 28 are "yes," answer the following:		30. Any answers under item 30 are "yes," state date and place of examination.	
31. Date of disease or injury on account of which claim is made and date each began. Sept. 1943		32. Nature of disease or injury on account of which claim is made and date each began. Hodgkins Disease	
33. Have you received any treatment while in the service, give name, number or location of hospital, first-aid station, dressing station or infirmary, or the organization to which it was attached, the dates of treatment, and nature of sickness, disease, or injury. Pase Hospital #3 - Hodgkins Disease 3 Sept. 1943 to 14 Sept 1943		34. Have you received any treatment while in the service, give name, number or location of hospital, first-aid station, dressing station or infirmary, or the organization to which it was attached, the dates of treatment, and nature of sickness, disease, or injury. H. Oakland, Calif. " 17 Sept 1943 to Nov. 20, 1943 H. Seattle, Wash. " 20 Nov. 1943 to 15 Jan 1944 " " 8 July 1944 to Aug 1944	



Have you a child or children living under 18 years of age and unmarried or any child of any age who is insane, idiotic, otherwise permanently helpless? If so, state the following particulars about each child.

FULL NAME OF CHILD	70. DAYS OF BIRTH			71. PLACE OF BIRTH	72. NAME AND ADDRESS OF PERSON WITH WHOM CHILD LIVES
	DAY	MO.	YEAR		
<i>Allen Perry Donaldson</i>	<i>29</i>	<i>4</i>	<i>47</i>	<i>Seattle</i>	<i>Parents</i>
<i>Isidore William Donaldson</i>	<i>12</i>	<i>7</i>	<i>48</i>	<i>Seattle</i>	<i>Parents</i>

State your father's name and address <i>W. N. Donaldson</i>	<i>1113 Aurora</i>	Date and place of birth <i>Seattle</i>	Is he dependent on you for support? <i>no</i>
State your mother's name and address <i>M. H. N. Donaldson</i>	<i>1113 Aurora</i>	Date and place of birth <i>Seattle</i>	Is she dependent on you for support? <i>no</i>

State full name and complete address of nearest relative at date this claim is filed *1402 - 15 Th. N.E.*
Mrs. Elvira L. Donaldson *Seattle 55 Wn.*

I HEREBY CERTIFY that I (have read) (have had read to me) all questions and answers thereto embodied in this application; that answers to all above questions are true and complete to the best of my knowledge and belief; that all available information in support of this application is contained in the foregoing statements which are made as part thereof with full knowledge of the penal provisions for making a false statement as to a material fact as printed on Page 1 of this application.

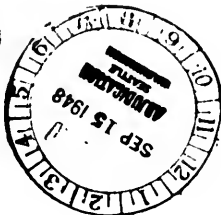
Allen Perry Donaldson
(Signature of claimant)

* Delete inapplicable words.

Use this space for any remarks (continue items by box number).

U. S. GOVERNMENT PRINTING OFFICE 16-50000-4

Defendant's Exhibit No. A-2—(Continued)





DEFENDANT'S EXHIBIT No. A-3

Veterans Administration

AWARD OF DISABILITY COMPENSATION
OR PENSION (Service Connected)

Regional Office 1506 Textile Tower, Seattle 1,
Washington

October 26, 1948

File No. 14,494,247

To: Mr. Allen Perry Donaldson,
16802 15th North East, Seattle, Washington

In accordance with the provisions of Public 2, 73rd Congress as amended you are hereby notified that as a veteran who was discharged from the military service of the United States on the 19th day of October, 1945, you are awarded disability compensation in the amount of \$138.00 from September 2, 1948, on account of disability resulting from the following conditions held to have been incurred or aggravated during your military service, Hodgkin's Disease.

The monthly payments pursuant to this award will continue during the period in which you are \$138.00 disabled subject to the general conditions mentioned on the reverse side of this communication to which your attention is directed. Upon the happening of any of the contingencies mentioned the Veterans Administration should be notified promptly.

If you are dissatisfied with the findings of the Veterans Administration or the amount of this award it is your privilege to enter an appeal there-

DEFENDANT'S EXHIBIT No. A-6

To: Rating Board

Nov. 8, 1948

From: Veterans of Foreign Wars

This file is hereby submitted for the consideration of the Rating Board.

Walter A. Deebach,
Department Service Officer, Department of Washington, Veterans of Foreign Wars.

[Stamped]: File Nov. 9, 1948. HBB.ADJ.

[Endorsed]: No. 15308. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Marguerite Allen Donaldson and Elmira Donaldson Lucker, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15308

UNITED STATES OF AMERICA, Appellant,
v.
MARGUERITE MAY DONALDSON, Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The appellant will urge the following points in the appeal of the above-entitled case:

1. The District Court erred in holding that the insured veteran was prevented from applying for waiver of premiums on his lapsed NSLI policy by circumstances beyond his control, at a time when he knew that he was totally disabled.

2. The District Court erred in awarding appellee's counsel twenty per cent of the judgment entered on her behalf, rather than the ten per cent maximum allowed by statute.

3. The District Court erred in denying appellant's motions to reopen the hearing on the basis of newly-discovered evidence and for a new trial.

/s/ CHARLES P. MORIARTY,

United States Attorney,

/s/ JOHN A. ROBERTS, JR.,

Assistant United States Attorney,

Of Counsel for Appellant

Acknowledgment of Copy Received Attached.

[Endorsed]: Filed Nov. 2, 1956. Paul P.
O'Brien, Clerk.



15308
No. 15398

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

V.

**MARGUERITE MAY DONALDSON AND ELMIRA DONALDSON
LUCKER, APPELLEES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTH-
ERN DIVISION**

BRIEF FOR APPELLANT

GEORGE COCHRAN DOUB,
Assistant Attorney General.

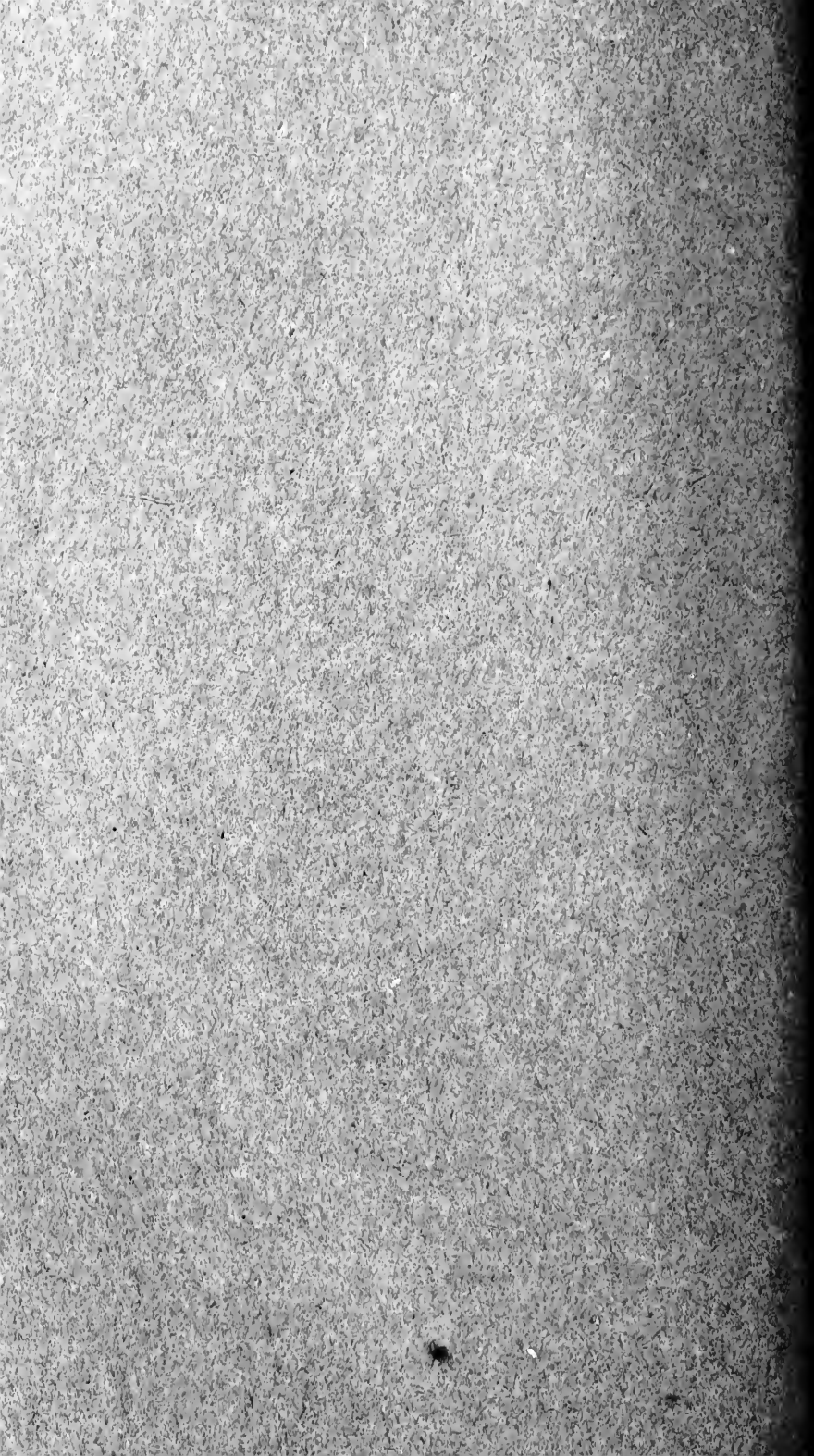
CHARLES P. MORIARTY,
United States Attorney.

**SAMUEL D. SLADE,
WILLIAM W. ROSS,**
*Attorneys,
Department of Justice,
Washington 25, D. C.*

FILE

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PAUL P. O'BRIEN



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15398

UNITED STATES OF AMERICA, APPELLANT

v.

MARGUERITE MAY DONALDSON AND ELMIRA DONALDSON
LUCKER, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTH-
ERN DIVISION*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on March 27, 1956 by the District Court for the Western District of Washington (R. 35, 36) granting judgment to the appellees for the proceeds of a \$10,000 National Service Life Insurance Policy on the life of Allen Perry Donaldson. The District Court's jurisdiction was based upon 38 U.S.C. 445, 817. The United States filed notice of appeal on July 5, 1956 (R. 51) and time for docketing the appeal was extended by order of the District Court to October 3, 1956 (R. 51). The case was docketed in

this Court on September 29, 1956 (R. 92). This Court's jurisdiction rests upon 28 U.S.C. 1291 and 38 U.S.C. 445.

STATEMENT OF FACTS

This action was brought in the United States District Court for the Western District of Washington to recover the proceeds of a National Service Life Insurance Policy issued to Allen Perry Donaldson.

The facts are not disputed. Donaldson was issued an NSLI policy in the amount of \$10,000, on which his mother was designated as principal beneficiary and his father as contingent beneficiary, in naval service during World War II (R. 24, 25). Donaldson was found to be suffering from Hodgkins Disease after examination at the naval hospital at Oakland, California in September 1943 (R. 25). In July 1944, Donaldson was transferred to the naval hospital at Seattle, Washington, where his diagnosis was changed from Hodgkins Disease to Lymphadenitis Cervical, a curable condition (R. 25). Donaldson was released from the Seattle hospital in August 1944, and returned to active duty as physically fit (R. 25). When he was discharged from naval service in October 1945, he was found to be physically fit, except for "defective vision—caries teeth" (R. 25, 26, 32). Donaldson's NSLI insurance policy lapsed for nonpayment of premiums in December 1945 shortly after his discharge (R. 26). He worked at various jobs from the time of his discharge until September 1948, when he developed a lump under his arm. He was examined immediately by Veterans Administration physicians and diagnosed as suffering from Hodgkins Disease (R. 32). For over three years following this diagnosis, Donaldson received out-patient treat-

ment at regular intervals at the Veterans Administration Seattle hospital (R. 32). He was again hospitalized in March 1952, and died on March 24, 1952 from Hodgkins Disease (R. 32). After Donaldson's death, his mother, the principal beneficiary of his insurance, applied for benefits under the policy (R. 30, 31). When her claim was denied by the Administrator, she brought this suit to recover the policy proceeds, contending that Donaldson had been totally disabled at all times between 1945 and 1952, and that his failure to apply for waiver of premiums on his policy was due to circumstances beyond his control (R. 3-6). The case was tried to the district court in January 1956.

On the day of the trial, Donaldson's widow filed a motion to intervene, and a complaint in intervention, contending that Donaldson had designated her as beneficiary on his policy and that she was entitled to the proceeds (R. 9-22). The District Court, on February 6, 1956, after finding that Donaldson had been totally disabled from the time his policy lapsed, and had been prevented by circumstances beyond his control from applying for a premium waiver, denied the motion to intervene and indicated that it would give judgment for the plaintiff for the policy proceeds. Subsequently, on February 27, 1956, with the concurrence of Government counsel, the district court vacated its prior order and granted the motion to intervene (R. 50). On March 13, 1956, counsel for the plaintiff and for Donaldson's wife advised the court of an agreement that plaintiff would assign 50 per cent of her interest in the insurance proceeds to the intervenor wife, as trustee for Donaldson's minor children (R. 32, 33, 35, 36, 51). The district court dismissed the complaint in intervention on March 19, 1956, and entered judgment on March 27, 1956 awarding

one-half of the policy proceeds to plaintiff and the remaining half to the wife, pursuant to a stipulation filed with the district court (R. 23-36). A timely motion by Government counsel to reopen the case on the basis of newly discovered evidence contained in an affidavit filed by the wife in support of her motion to intervene and for a new trial was denied on May 7, 1956 (R. 47). This appeal followed.

SPECIFICATION OF ERRORS TO BE URGED ON APPEAL

1. The District Court erred in holding that the insured veteran Donaldson was prevented from applying for waiver of premiums on his lapsed NSLI policy by circumstances beyond his control, at a time when he knew that he was totally disabled.

2. The District Court erred in awarding appellee Donaldson's counsel twenty per cent of the judgment entered on her behalf, rather than the ten per cent maximum allowed by statute.

3. The District Court erred in denying appellant's motions to reopen the hearing on the basis of newly-discovered evidence and for a new trial.

SUMMARY OF ARGUMENT

I

A. The National Service Life Insurance Act (38 U.S.C. 802(n)) permits waiver of past due premiums on NSLI policies on application by the insured within one year of the latest date on which waiver is sought. The insured's failure to apply within the time limit is excused if "due to circumstances beyond his control". This Court held in *Kershner v. United States* that an insured veteran who is ignorant of the nature or seriousness of a condition entitling him to waiver of premiums on a lapsed National Service Life Insurance

Policy is thereby prevented from applying for a waiver of premiums by "circumstances beyond his control" within the meaning of 38 U.S.C. 802(n). The evidence and the district court's findings in this case permit no doubt that Donaldson, the insured veteran here, knew for three years prior to his death that he was then totally disabled and had been suffering from an incurable disease since his policy lapsed. Since despite this knowledge Donaldson failed to apply for a premium waiver, under the *Kershner* decision there can be no doubt that his beneficiary was not entitled to a retroactive waiver of premiums.

B. The fact that Donaldson may have been uncertain, when he discovered his total disability in 1948, whether he had in fact been totally disabled at all times since his policy lapsed in 1945, and hence in doubt as to whether he was entitled to a retroactive waiver, did not relieve him of the statutory requirement of applying for a waiver of premiums to have his eligibility determined. Nor can his presumed uncertainty be considered a "circumstance" preventing him from applying for a waiver. Any other view would have the practical effect of eliminating the requirement, imposed by Congress, that a waiver be applied for within one year of the policy lapse.

C. Finally, assuming that Donaldson was uncertain or misinformed as to his legal rights, such uncertainty was clearly not a circumstance beyond his control preventing him from filing an application to determine and preserve his rights.

II

The District Court awarded 20% of the judgment received by the appellee, Marguerite Allen Donaldson, to Counsel for appellee Donaldson, instead of the 10%

maximum authorized by 38 U.S.C. 551, 817. It is well settled that no more than the statutory maximum can be allowed.

ARGUMENT

I

No "Circumstances Beyond His Control" Within the Meaning of 38 U.S.C. 802(n) Prevented Donaldson From Applying for Waiver of Premiums on His National Service Life Insurance Policy.

A. Under This Court's Decisions, Donaldson Was Not Prevented From Applying for a Waiver of Premiums by "Circumstances Beyond His Control".

Section 602(n) of the National Service Life Insurance Act (38 U.S.C. 802(n), *infra*, p. 21) states that premiums on National Service Life Insurance policies may be waived during total disability of the insured, provided the insured files an application for the waiver within one year of the earliest date on which waiver is sought.¹ The third proviso of Section 802(n) states that the application requirement may be relaxed by the

¹ A similar requirement that the application must be made within a limited time is common in commercial insurance policies providing disability waivers. Many such policies require an application while the policy is still in force under premium-paying conditions. See Appelman, *Insurance Law and Practice*, Sec. 8309-10 (1944 ed.); Couch, *Cyclopedia of Insurance*, Sec. 609 (1929). Some commercial policies permit notice and proof of loss (i.e., application for waiver of premiums) as late as thirty or sixty days after the date of an unpaid premium. Uniformly, these limitation provisions are accorded binding effect by the courts. See e.g., *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489; *Columbian Nat. Life Ins. Co. v. Goldberg*, 138 F. 2d 192, 196 (C.A. 6), certiorari denied, 321 U.S. 765; *Patterson v. National Life & Accident Ins. Co.*, 183 F. 2d 745 (C.A. 6); *Nalley v. New York Life Ins. Co.*, 138 F. 2d 318 (C.A. 5); *Egan v. New York Life Ins. Co.*, 67 F. 2d 899 (C.A. 5); *Equitable Life Assur. Soc. of U.S. v. Mercantile Commerce Bk & Trust Co.*, 143 F. 2d 397, 399-400 (C.A. 8); *Magill v. Travelers Ins. Co.*, 133 F. 2d 709, 712 (C.A. 8), certiorari denied, 319 U.S. 773; *Rintoul v. Sun Life Ass'n Co.*, 142 F. 2d 776 (C.A. 7), certiorari denied, 323 U.S. 776; *Griffiths v. Massachusetts Mut. Life Ins. Co.*, 96 F. 2d 57 (C.A. 2).

Administrator for any period during which the insured's failure to apply for a waiver is found to be "due to circumstances beyond his control." The third proviso was added in 1942 during World War II at the request of the Veterans Administration, which drafted its language, in order to protect the insurance of servicemen who had become physically isolated such as war captives, and insane or mentally incompetent persons, all of whom are denied the opportunity to apply for a waiver by "circumstances" beyond their "control". This was the view of the proviso taken by the Veterans Administration at the time it was drafted and presented to Congress, and has been the Administration's consistent view since that date. S. Rep. No. 1430, 77th Cong., 2d Sess.; H. Rep. No. 2312, 77th Cong., 2d Sess.; S. Rep. No. 1105, 78th Cong., 2d Sess; see also *Aylor v. United States*, 194 F. 2d 968 (C.A. 5); *Scott v. United States*, 189 F. 2d 863 (C.A. 5), certiorari denied, 342 U.S. 878; *United States v. Cooper*, 200 F. 2d 954 (C.A. 6); *Gossage v. United States*, 229 F. 2d 166 (C.A. 6).

This Court, however, in *Kershner v. United States*, 215 F. 2d 737 (C.A. 9) following *Landsman v. United States*, 205 F. 2d 18 (C.A.D.C.), certiorari denied, 346 U.S. 876. has extended the scope of the proviso to cover a veteran who was ignorant of the existence or extent of his disability and was thereby "deprived of a chance, disability existing, to make a free or intelligent choice of whether or not he wanted his insurance to continue." (215 F. 2d at 739).

The *Landsman* proceeding in the District of Columbia Circuit concerned a veteran who developed Hodgkins Disease in military service and allowed part of his NSLI policy to lapse on his discharge. When, two years later, the veteran died of Hodgkins Disease, his beneficiary brought suit for the lapsed policy proceeds, her

complaint alleging, *inter alia*, that it would have been impossible for the veteran to have discovered his eligibility for a waiver, since both he and his physicians were ignorant of his true condition until he was “on his death bed” and that she was therefore entitled to a retroactive waiver. The Government moved for summary judgment without controverting these allegations. The district court gave judgment for the Government, apparently concluding that the third proviso of Section 802(n) was limited to mental incompetence, and therefore did not apply to total ignorance of a disease. On the issue thus framed, the District of Columbia Circuit reversed, holding (*id.* at 22) that “ignorance of the existence or seriousness of an injury or disease may in a proper case constitute such a circumstance [beyond the veteran’s control]—*if the ignorance is in fact beyond control.*” (Emphasis supplied).

In *Kershner*, *supra*, this Court, following *Landsman*, held that a totally and permanently disabled veteran whose physicians for medical reasons “chose to encourage him to believe there was real hope for an eventual recovery” was unaware of the seriousness of his true condition, which this Court held was a circumstance beyond his control preventing him from applying for a waiver. Since the veteran had been misled by his physicians as to his true physical condition, the Court found that his ignorance was in fact beyond his control (215 F. 2d at 739).

Here, unlike *Kershner* and *Landsman*, appellee did not contend² and the district court did not find that

² The complaint stated (R. 5):

That due to the nature of the disease, it was impossible for Allen Perry Donaldson to know his condition, especially in view of the errors in diagnosis, until some time after 1948.

Donaldson was ignorant of his true condition at all times prior to his death, including the period following September 1948 when he was rediagnosed as suffering from Hodgkins Disease. Rather, the court found that “it was impossible for Allen Perry Donaldson to know his condition *until some time after 1948*” (F. VIII; R. 28). The district court’s findings recognized that, although Donaldson might have been ignorant of his disease prior to 1948, he was aware of his condition during the three-year period following rediagnosis and preceding his death.³ In contrast to *Kershner*, the decision below was not based on a finding that Donaldson was ignorant of his disability at all times prior to his death, but rested on an entirely different basis: Donaldson’s assumed uncertainty as to whether he was totally disabled in 1945. This basis for the decision is considered in part IB, *infra*, pp. 11-14.

Unlike the veteran in *Kershner*, therefore, while Donaldson might have been ignorant of his true condition during 1945-1948 because his disease was in recession during that period (R. 59-64), it is clear that he was capable of making an “intelligent choice of whether or not he wanted his insurance to continue” during the following three years when he recognized the seriousness of his condition (*Kershner, supra*, at 739).⁴

³ This conclusion, which is implicit throughout the district court’s findings, is supported by undisputed evidence that Donaldson knew that he had Hodgkins Disease, and that he was aware of the seriousness of this condition. (R. 53, 55, 56, 71-74, 75). In this connection, it is significant that Donaldson immediately applied for and received compensation for 100% disability on learning of his diagnosis. (R. 70, 75).

⁴ Donaldson was mentally competent at all times prior to his hospitalization immediately prior to his death (R. 58).

This Court was at pains to point out in *Kershner* (*id.* at 740) that

Had the veteran fully known of his condition and its almost certain ending within a short time, and he being competent mentally, as Kershner was, then this Court should hold against him.

The record below and the district court's findings establish that for three years Donaldson knew that he had Hodgkins Disease, and recognized the seriousness of this disease. Since he did not apply for waiver of premiums within one year of the time he discovered his true condition, he was not entitled to a waiver at the time of his death. His beneficiary stands in no more favorable a position, *Kershner v. United States*, *supra*, at 739, and cases there cited.

This conclusion accords with the Sixth Circuit's holding in *Gossage v. United States*, 229 F. 2d 166, 170 (C.A. 6) denying recovery on a lapsed policy on the life of a totally disabled veteran who failed to apply for waiver of premiums despite knowledge of his disability, stating:

Appellant has not argued that even though Garner [the insured] knew of his illness in September or October, 1947, he did not know of it prior to August 1, 1947. In any event, while the exact date that Garner learned of his condition was not known, he had a duty to act [*i.e.*, apply for premium waiver] within a reasonable time after October, 1947, when he concededly knew of his condition, and he failed to do so.

B. Donaldson Was Not Prevented From Applying for a Waiver of Premiums on His Insurance Policy by His Alleged Uncertainty Whether He Was Disabled at the Time His Policy Lapsed.

1. Thus far we have sought to show that under this Court's decisions the district court's findings provide no basis for its ultimate conclusion that Donaldson, from the time his policy lapsed up to his death, was prevented from applying for a premium waiver by circumstances beyond his control. The district court's comments at the conclusion of the trial (R. 75-82), however, suggest a further ground for its conclusion that appellees were entitled to a waiver. Although the court recognized that Donaldson knew his true condition after September 1948, it reasoned that a possible uncertainty on the part of the veteran in 1949-1952 as to whether or not he had been totally disabled, not during those years but when his policy lapsed in 1945, was *a circumstance beyond his control preventing him from applying for waiver between 1949 and 1952* (R. 79-80).

This conclusion flies squarely in the face of common sense and the statutory requirement. It is of course possible that Donaldson, after he became aware of his true condition in 1949, could not be absolutely certain whether he had been totally disabled in 1945-47, and hence might have been uncertain whether he was eligible for waiver under this Court's decisions, in view of the fact that he did not apply within a year of his policy's lapse. If this was the case, his obvious remedy was to apply for waiver as provided in Section 802 (n), and have that issue determined. Waiver applicants must frequently be in some doubt as to whether they are in fact eligible for a waiver, but a doubt of this kind clearly does not relieve them of the obligation to

make the application, which is a statutory preliminary to allowance of a waiver. It is sufficient here that Donaldson knew there was a good chance he *might* be entitled to waiver of premiums by virtue of total disability and hence that it was in his interest to file an application in order to determine that fact. His assumed uncertainty,⁵ not as to his present disability but with regard to his health at the time his policy lapsed, similarly could not have been a "circumstance beyond his control" preventing him from applying for a disability waiver to resolve the question. See *Gossage v. United States*, *supra*, p. 10.

2. The District Court at the conclusion of its oral decision (R. 82) although purporting to rely on both the "spirit and the letter" of *Kershner*, recognized that the theory which it adopted constituted a departure from that holding, stating that "I recognize that the Court in this case has probably gone further than any other court in which a decision has been reported * * *." The reasoning adopted by the District Court, practically speaking, abrogates the requirement that applications for waiver of premiums be made within one year of the earliest date waiver is sought (in this case, the date of the policy lapse). The obvious purpose of Congress in requiring an application to the Administration within a year's time was to permit determination of total disability while evidence as to the veteran's health was still available to the Administration. While this Court has extended the exception, we submit incorrectly, to cover not only the incompetent or insane soldier and the war captive or the ship-

⁵ No evidence was introduced as to Donaldson's state of mind in 1949-1952 with regard to his health condition in 1945-1947.

wrecked sailor (*cf. Kershner, supra*, at 739), but also insured veterans who are ignorant of the nature or seriousness of their total disability, "if the ignorance in fact is beyond control" *Landsman v. United States*, 205 F. 2d 18, 22 (C.A.D.C.); *Kershner, supra* at 740, the district court's theory eliminates entirely the requirement that the circumstances be beyond the veteran's "control" in any real sense, thereby reading the application requirement out of the statute.

As we have pointed out, most beneficiaries could claim with some plausibility that their insured could not have been certain he was totally disabled when his policy lapsed. A very large number of NSLI policies lapsed in 1945-1946 when, as here, the policy holders were discharged from service and their premiums were no longer withheld from their pay. If years later after their deaths, beneficiaries could rely on the veterans' uncertainty as to the existence and extent of their disability at the time of discharge—thus excusing a failure to apply for a waiver even after the veteran became fully aware of a pre-existing disability—it would be futile as a practical matter for the Government to try to show that a veteran knew he was disabled at the time he allowed his policy to lapse.

The district court's theory therefore is doubly objectionable: first, because it would allow a beneficiary to obtain waiver of premiums despite the fact that the veteran, as here, unquestionably knew of his total disability and failed to act; and second, because it would extinguish in many cases the statutory requirement for a timely waiver application by expanding a narrowly drawn exception in order to permit recovery by beneficiaries of veterans who were not prevented from

applying for a waiver by any factor over which it could be said they had no control.”

C. Donaldson Was Not Prevented by His Alleged Ignorance of His Legal Rights From Applying for a Waiver of Premiums.

1. Certain evidence introduced at the hearing below might be interpreted as showing that Donaldson not only was aware of his permanent total disability but that he contemplated filing an application for a waiver of premium, but did not do so after apparently concluding that his rights on the policy had expired. When Donaldson learned that he was totally disabled in September 1948, he designated the Veterans’ of Foreign Wars as his legal representative before the Veterans Administration. The VFW assisted him in applying for disability compensation and (according to Donaldson’s father and an affidavit filed by Donaldson’s wife as intervenor (R. 10, 11, 65-74)), apparently advised him that he could not obtain waiver of premium on his insurance but that suit could be brought after his death to establish his rights. Donaldson’s father also testified that sometime in 1948 he had accompanied his son to a Veterans Administration branch office in Seattle to inquire about his insurance after Donaldson learned of his total disability, and was told by an unidentified VA employee that Donaldson had no rights under the

⁶ The Government continues to adhere to its view that the third proviso to 802 (n) was not intended to apply to ignorance or other states of mind, but rather to any physical disability, restraint or mental incapacity actually preventing the veteran from making application; and the Court is urged to reconsider its decision in *Kershner* in the light of the arguments presented here, as well as in that case. Accepting *Kershner* as the law of this Circuit, however, we submit for the reasons presented here that the district court’s decision was wrongly decided.

policy inasmuch as it had lapsed for non-payment of premiums in 1945 (R. 65-74). The district court did not refer to and made no findings with respect to this evidence, which, of course, if accepted, leaves no doubt that Donaldson knew his condition and that he could file an application for waiver of premiums.

Appellee may argue, on the assumption that the foregoing evidence must be accepted at face value, that Donaldson was misled by the VFW or by a VA employee as to his legal rights under the statute, and that this was a circumstance beyond his control which prevented him from filing for a waiver of premium.

It is clear, assuming what has by no means been established, that he was misled, that Donaldson was not relieved of the obligation to file an application for waiver of premiums merely because of a mistaken belief that right to waiver could be established after his death. Under well established principles, a mistake as to the law, even though induced by another, did not relieve Donaldson of the statutory requirement of preserving his legal rights by filing a timely application, thereby giving the VA an opportunity to determine his entitlement to waiver while he was still living.⁷ *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-385. Moreover, assuming that weight can be assigned to the nebulous testimony of Donaldson's father regarding visit

⁷ The Government accepts, for the purposes of this appeal, the district court's finding that Donaldson was totally disabled between 1945 and 1948. In the district court, the Government contended that Donaldson's disease, which had been in recession during this time, had not prevented him from working over a three year period without injury to his health, and that he was not therefore totally disabled in an insurance sense during the period. See *United States v. Deal*, 82 F. 2d 929 (C.A. 9); *Corrigan v. United States*, 82 F. 2d 106 (C.A. 9).

to the VA branch office, it is well established that misinformation supplied to an insured person by a government employee does not have the effect of estopping the Government from denying liability on an insurance contract. *Federal Crop Insurance Corp. v. Merrill*, *supra*; *Scott v. United States*, 189 F. 2d 863 (C.A. 5), certiorari denied, 342 U.S. 878; *McIndoe v. United States*, 194 F. 2d 602 (C.A. 9); *United States v. Stewart*, 311 U.S. 60.

The alleged advice given Donaldson also cannot be said to have been a circumstance beyond his control which prevented him from filing an application. Ignorance or uncertainty as to the law is not ignorance of the extent or existence of total disability, the factor found to be a circumstance beyond the veteran's control in *Kershner*, *supra*; *United States v. Myers*, 213 F. 2d 223 (C.A. 8) and *United States v. Vandver*, 232 F. 2d 398 (C.A. 6). See *Scott v. United States*, 189 F. 2d 863, certiorari denied, 342 U.S. 878; *Landsman*, *supra*, 205 F. 2d at 22, *fn.* 12. Donaldson was of course presumed to know the terms of his contract and the law, *Federal Crop Insurance Corp. v. Merrill*, *supra*, and advice concerning legal rights, if in fact advice was given, was not a circumstance beyond the veteran's control preventing him from applying for a waiver, even in the sense that a veteran is said to be prevented from applying by ignorance of his disability—the sole basis for waiver eligibility. If, as the district court found, Donaldson knew that he was totally and permanently disabled “sometime” after September 1948, he was not prevented from making a waiver application by uncertainty as to his legal rights (and the evidence at most reveals uncertainty, not total ignorance). Furthermore, such uncertainty, assuming its existence, was not beyond the veteran's control, for it could be resolved readily by the very action that Donaldson failed

to take—an application for waiver of premiums. As the District of Columbia Circuit points out in *Landsmen* (205 F. 2d at 22) a veteran's "ignorance"—may constitute such a circumstance—"if the ignorance is in fact beyond control."

The Veterans Administration, and the Insurance Fund which it administers, (38 U.S.C. 805), are unquestionably entitled to the protection provided by Congress in requiring that waivers be sought within a year after the veteran first becomes aware that he might be totally disabled, and therefore able to revive his lapsed policy. A veteran's ignorance or uncertainty as to his contract rights cannot nullify this Congressional requirement in the light of long established principles to the contrary, which have the sanction both of common sense and authority. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-385,⁸ *McIndoe v. United States*, 194 F. 2d 602 (C.A. 9).

⁸ "If the Federal Crop Insurance Act had by explicit language prohibited the insurance of spring wheat which is reseeded on winter wheat acreage, the ignorance of such a restriction, either by the respondents or the Corporation's agent, would be immaterial and recovery could not be had against the Corporation for loss of such reseeded wheat. * * * Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. The oft-quoted observation in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States*, 254 U. S. 141, 143, that "Men must turn square corners when they deal with the Government," does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury. The "terms and conditions" defined by the Corporation, under authority of Congress, for creating liability on the part of the Government preclude recovery for the loss of the reseeded wheat no matter with what good reason the respondents thought they had obtained insurance from the Government. (332 U.S. at 384, 385)."

It is not without significance, moreover, that the district court failed to find that Donaldson was misled into believing that his rights could be established only by suit after his death. At face value, the testimony of Donaldson's father amounts merely to an assertion that Donaldson was told by a minor VA employee that he no longer had any rights under his policy inasmuch as it had lapsed for non-payment of premiums more than a year previously; as far as it went, a correct statement. We do not know exactly what questions were asked; and it is unclear what information, if any, was supplied to the VA employee concerning Donaldson's health prior to 1948, or that he received definite advice from the employee regarding his right to a retroactive waiver for continuous total disability (See R. 67, 68, 72). In view of the vague character of this evidence, we believe that the district court was correct in refusing to assign weight to it. At most, if accepted, it shows conclusively that Donaldson was aware after September 1948 of the possibility that he might be entitled to a waiver.

Whatever value is assigned this evidence, however, it is clear from the record and the findings below that Donaldson knew of his condition after 1948, and thus was in a position to make "an intelligent choice of whether or not he wanted his insurance to continue." It follows that "this Court should hold against him." *Kershner, supra* at 739, 740.

II

No More Than Ten Percent of the Total Recovery Obtained by any Claimant Under a National Service Life Insurance Policy Can Be Awarded as Counsel Fees.⁹

The District Court gave judgment of the proceeds of the \$10,000 NSLI policy to the appellee Marguerite May Donaldson, and awarded \$1,000 attorney's fees to appellee's counsel or 10 percent of the total judgment (R. 35, 36). The judgment, however, went on to provide for an award of 50% of the proceeds or \$5,000 to the intervenor, Elmira Donaldson Tucker as guardian of Donaldson's minor children. Thus, the judgment in favor of Mrs. Donaldson, and the award made to her, in reality amounted to \$5000.00, and the attorney's fees allowed counsel constituted 20 percent of the award which he obtained for his client.

Section 617 of the National Service Life Insurance Act (38 U.S.C. 817) incorporates by reference the provisions of 38 U.S.C. 445, 551, which provide that a court may assess counsel fees in suits on government insurance policies. "said fees not to exceed 10 per centum *of the amount recovered* and to be paid by the Veterans' Administration out of the payments to be made under the judgment or decree * * * " (Emphasis supplied). The collection of fees in excess of this amount is made a misdemeanor punishable by fine or imprisonment (38 U.S.C. 551). This limitation uniformly has been recognized and enforced by the courts. *Bradley v. United States*, 143 F. 2d 573 (C.A. 10), certiorari denied, 323 U.S. 793; *United States v. Kaustovich*, 17 F. 2d 84 (C.A. 4); *Saunders v. United States*, 22 F. 2d 619 (C.A. 7); *Lane v. United States*, 116 F. Supp. 606 (WDSC);

⁹ This point is not reached if the Court agrees that the judgment below must be reversed, for the reasons set forth, *supra* pp. 6-18.

Cotter v. United States, 78 F. Supp. 495 (D. Md.). As the Supreme Court stated in construing this statute in *Hines v. Lowrey*, 305 U.S. 85, 90:

The history of § 500 [§ 551] manifests beyond doubt the clear establishment of a public policy against the payment of fees for prosecution of veterans' claims in excess of those fixed by statute. Collection of a greater fee than that fixed in the statute is made a crime, and this Court has sustained a conviction under the statute. Contracts for the collection of fees in excess of valid statutory limitations and for services validly prohibited by statute cannot stand * * *

Should the Court disagree with our contention that the judgment below must be reversed, the District Courts' order should be modified to award as counsel fees the statutory maximum of 10% of the amount recovered by appellee Donaldson.

CONCLUSION

For the above reasons, we respectfully submit that the judgment below should be reversed.

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CHARLES P. MORIARTY,

United States Attorney.

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STATUTORY APPENDIX

Section 602(n) of the National Service Life Insurance Act, as amended, 38 U. S. C. 802(n), provides as follows:

Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability commenced (1) subsequent to the date of his application for insurance, (2) while the insurance was in force under premium-paying conditions, and (3) prior to the insured's sixtieth birthday: *Provided*, That upon application made within one year after August 1, 1946, the Administrator shall grant waiver of any premium becoming due not more than five years prior to August 1, 1946 which may be waived under the foregoing provisions of this subsection: *Provided further*, That the Administrator, upon any application made subsequent to one year after August 1, 1946, shall not grant waiver of any premium becoming due more than one year prior to the receipt in the Veterans' Administration of application for the same, except as hereinafter provided. Any premiums paid for months during which waiver is effective shall be refunded. The Administrator shall provide by regulations for examination or reexamination of an insured claiming benefits under this subsection, and may deny benefits for failure to cooperate. In the event that it is found that an insured is no longer totally disabled, the waiver of premiums shall cease as of the date of such finding and the policy of insurance may be continued by payment of premiums as provided in said policy: *Provided*

further, That in any case in which the Administrator finds that the insured's failure to make timely application for waiver of premiums or his failure to submit satisfactory evidence of the existence or continuance of total disability was due to circumstances beyond his control, the Administrator may grant waiver or continuance of waiver of premiums: *And provided further*, That in the event of death of the insured without filing application for waiver, the beneficiary, within one year after the death of the insured or August 1, 1946, whichever be the later, or, if the beneficiary be insane or a minor, within one year after removal of such legal disability, may file application for waiver with evidence of the insured's right to waiver under this section. Premium rates shall be calculated without charge for the cost of the waiver of premiums herein provided and no deduction from benefits otherwise payable shall be made on account thereof.

IN THE
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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

MARGUERITE MAY DONALDSON
and ELMIRA DONALDSON LUCKER,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF FOR APPELLEE

JOHN F. DORE
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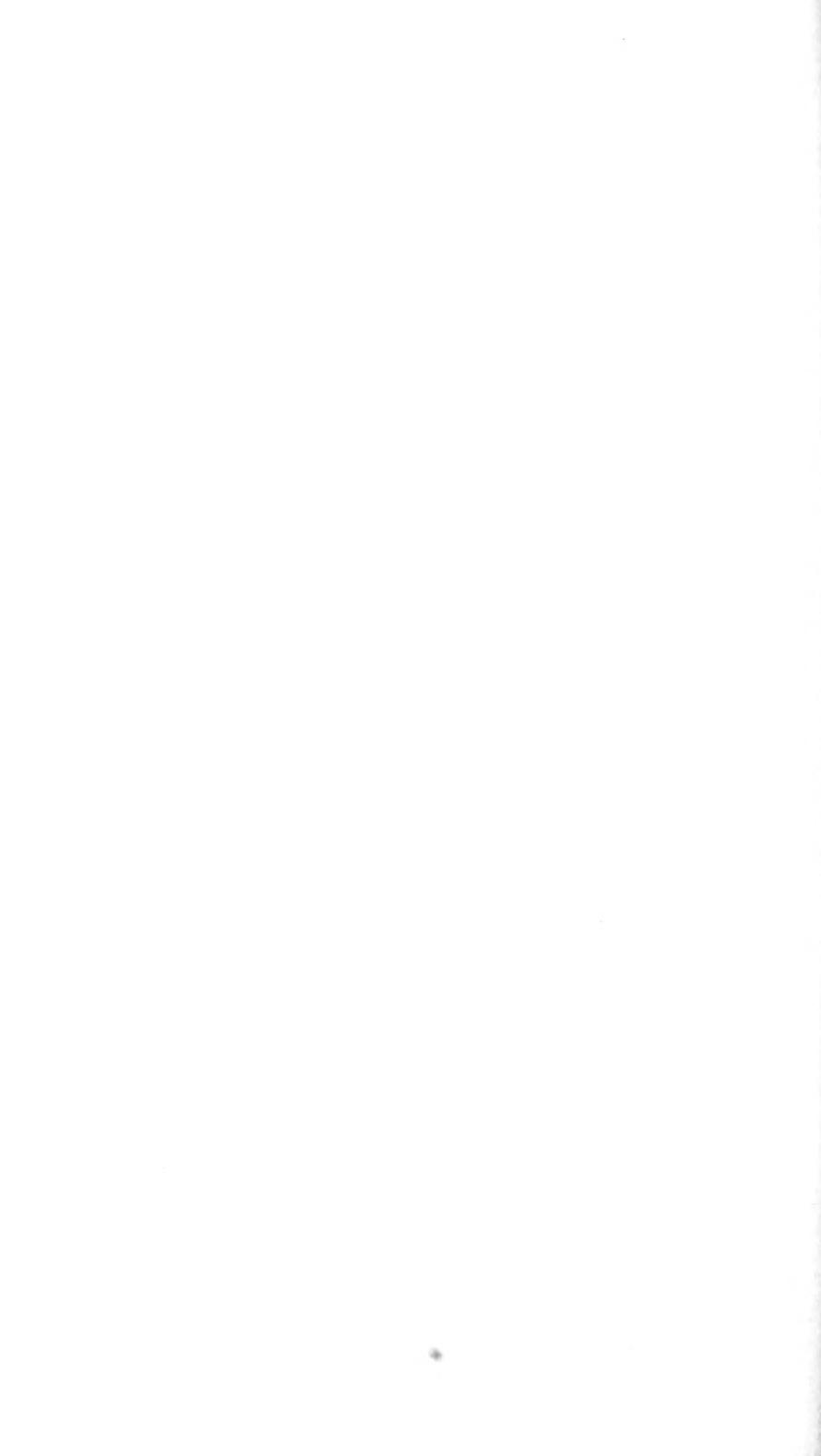


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BRIEF FOR APPELLEE

COUNTER STATEMENT OF FACTS

The statement of facts contained in the Brief for Appellant fails to include an important fact. Following the rediagnosis of the deceased insured veteran,

Allen Perry Donaldson, as having the fatal Hodgkins Disease in 1948, the deceased insured veteran, in the company of his father, William Nelson Donaldson, went to the offices of the Veterans' Administration in Seattle, King County, Washington. There they talked to an official about the possibility of the veteran's making application for waiver of premium, by reason of total disability, based upon the rediagnosis. There, the official advised them at that time that the waiver period had expired. They accepted the advice of the official. (R. 67).

SUMMARY OF ARGUMENT

(A)

One question is posited on this appeal, and that is whether the evidence supported the findings. To state the matter negatively is to say, "does the evidence preponderate against the findings of the District Court"?

While an abbreviated record is to be encouraged under prevailing rules of civil procedure, appellant must designate enough of the record of evidence to enable the Court of Appeal to make a determination. Where the points on appeal turn solely on whether the evidence was sufficient to support the findings of the District Court, nothing less than a complete statement

of the record of evidence could enable the Court of Appeal to review the question.

And that is not done here. Appellant has extracted only portions of the testimony of the witnesses named; and appellant has totally failed to designate the testimony of other witnesses unnamed in the abbreviated record brought to this court. Unless the evidence preponderates against the findings, the findings of the District Court should be sustained. All of the evidence is not here.

(B)

Allen Perry Donaldson, the deceased insured veteran, failed to file timely application for waiver of premiums, due to circumstances beyond his control. The circumstance was total ignorance of his fatal malady. And the circumstance of ignorance was solely and directly caused by an erroneous diagnosis of his military superiors, to whom he not only owed a duty of obedience, but in whom he had the profoundest confidence. He actually had the fatal and dreaded Hodgkins disease, but they certified that he did not. In fact, they discharged him as physically fit, save for defective vision and teeth. He was misled, and in being misled by his duly constituted superiors, he was justifiably ignorant of the true facts of his fatal and pernicious condition. He was, indeed, deprived of a free

and intelligent choice. The question posited before the Court, therefore is in fact this: Would the insured veteran have applied for a waiver of premiums (to which he was entitled), had he been advised of the true facts of his condition?

(C)

As to the award of attorneys fees to Plaintiffs' Counsel, that is a matter residing within the inherent judicial powers of the District Court.

(D)

The denial of a new trial was not error, because the motion was addressed to the discretion of the court. Unless the record discloses evidence demonstrating that the court abused its discretion, the denial of a new trial to appellant was not error.

ARGUMENT

I

Appellant's first specification of error urged on appeal is substantially this: that the evidence does not support the findings of the District Court. Appellant's first point, therefore attacks Finding of Fact Number VII (R. 27). It is a fundamental of appellate practice that the findings of the trial court will not

be disturbed, unless the evidence preponderates against them.

Here, the Appellant has not brought sufficient of the record to this Court to enable a review of questions of evidence, because the record is not complete. The full and complete testimony of Doctor Q. B. DeMarsh is absent from this record, as is the full and complete testimony of William Nelson Donaldson, and Elmira Donaldson Lucker. (R. 53, 59, 75). Mrs. Marguerite May Donaldson's testimony is also abbreviated. (R. 52). Another witness, a former employer of the deceased, insured, veteran, is completely absent. It is clear from the record that the trial court put considerable weight on the expert testimony of Dr. Q. B. DeMarsh, (R. 81); and all of Dr. DeMarsh's testimony is not in this record of evidence.

Certainly an abbreviated record is to be encouraged, for reasons too obvious to spell out here. *Rule 75(d), Federal Rules of Civil Procedure*. Nevertheless, the appellant must designate sufficient portions of the record to enable the court to make a full and accurate review. *Blake v. Trainer*, 148 F. (2d) 10, (1945), 79 U.S. App. D.C. 360.

And where, as here, the question on appeal turns upon the sufficiency of the evidence to support the findings of the trial court, the burden rests upon appellant

to bring before the appellate court a complete statement of the evidence upon which the findings of the trial court were based. Nothing less than a complete statement of the evidence entitles appellant to have a review of the question of whether the findings were erroneous. See: *Zander v. Lutheran Brotherhood of Minneapolis, Minnesota*. 137 F. (2d) 17, (C.A. 8), (1943).

II

Actually, the sole question before the trier of fact was whether the deceased, insured veteran would have applied for a waiver of premiums, (to which he was entitled), had he known that he had the dreaded Hodgkins disease in 1945, when he was discharged from service. In other words, did the fact that he was misled by an erroneous diagnosis of his military superiors, deprive him of a free and intelligent choice. He was ignorant of his actual condition; and his ignorance was due to error in diagnosis. He was not only misled to believe he did not have Hodgkins disease, but, he was discharged as physically fit.

Under proviso three of 802 (n), 38 U.S.C.A. the insured veteran is excused from the requirement of making timely application for waiver of premiums, where the failure is due to "circumstances beyond his control". In *Kershner v. United States*, 215 F. (2d)

737, (C.A. 9), (1954), the Court has ruled that ignorance may constitute a circumstance beyond the control of the insured. And where such ignorance is caused directly and proximately by an erroneous diagnosis, certainly it is a circumstance beyond his control. The fact that the deceased insured was misled, deprived him of a "free and intelligent choice".

Because the veteran had Hodgkins disease upon his discharge in September of 1945, he was entitled to a waiver of premiums on his policy as of that time. The evidence that he was discharged as physically fit indicates that he was misled as to his true condition, and all of the rights, including waiver of premiums pertinent thereunto. Certainly had the deceased insured known the true facts, he would have applied for waiver of premiums in September 1945. In *Kershner v. United States*, (*supra*), the Court of Appeals for the Ninth Circuit said this:

"If, absent a showing that the service man positively did not want insurance, it will be presumed he did want it".

III

Let us now regard the judicial authorities governing injustices as they have developed within the realm of National Service Life Insurance. There is now a line of cases which adhere to the view that the lan-

guage of the *National Service Life Insurance Act, Section 602(n)*, 38 U.S.C.A. 802(n), and provision three thereof, conveys a congressional intent to cover cases where the insured veteran was deprived of a chance to make a FREE AND INTELLIGENT CHOICE. *Kershner v. United States*, (*supra*); *United States v. Meyers*, 213 F. (2d), 223, (C.A. 8), (1954); and *Landsman v. United States*, 205 F. (2d) 18, (C.A. D.C.), (1953); certiorari denied, 346 U. S. 876.

Briefly abstracted the *Kershner case* concerns a deceased insured veteran who was discharged from active naval service on March 14, 1946. Premiums were paid on his NSLI policy to April 10, 1946. By March 10, 1946 he was totally disabled, and he died on November 16, 1949, from Leukemia. He neither had paid premiums, nor had he applied for waiver thereof. Was his failure to apply for a waiver of premiums due to "circumstances beyond his control"? The Court held it was. Reasoning that the language of the statute was to be given a "liberal construction", (citing *Landsman v. United States*, *supra*), the Court ruled that the veteran was denied a FREE AND INTELLIGENT CHOICE. Why? Because he was in fact totally disabled, and the Veterans' Administration forewent telling him the true facts, (for merciful reasons). In developing what it meant by a "free and intelligent choice", the Court said this:

“ . . . to give relief where one as a rule may assume that the veteran was hampered in making a choice, or prevented from doing so”.

Moreover, the Kershner case restated the philosophy governing the liberal interpretation given to proviso three of 38 U.S.C.A. 802(n), which is this:

“ . . . a further reason for the generosity in favor of the veteran is the beneficent approach in recent years of the whole government to the veteran. It has been that of the patron who says, “put yourself in my hands. Don’t worry. I’ll take care of you. Only after the veteran or his beneficiary has waked up in an administrative cul de sac, is it ever indicated to the veteran that a little independent advice might have been a good thing. Such is not the atmosphere in which a policy is bought from a private company.”

Secondly, the *Landsman case* (*supra*), which reversed the District Court, and ruled that a war veteran’s ignorance of the existence of an injury or disease, from which he suffers, may constitute a “circumstance beyond his control”, providing that the ignorance is, in fact, beyond his control. Parenthetically, would not the fact that a veteran was misled, not only by his military superiors, but by a Veterans’ Administration official, constitute a “circumstance beyond his control”? It is interesting to note that in the *Landsman case* the insured veteran suffered from Hodgkins disease, a pernicious malady which inevitably results in death.

Thirdly, the *Meyers case* wherein the insured veteran was discharged on December 31, 1945, his policy lapsing the following month. The government officers failed to notify the serviceman of his total disability at the time of discharge. Here, the Court apparently reasoned that this led the veteran not to apply for continuance or reinstatement of his policy. The Court ruled that the failure of governmental officers to inform the serviceman of total disability at the time of his separation constituted a "circumstance beyond his control".

Certainly, the real question which underlies all of the legal propositions posed to this Honorable Court is this: Was the insured entitled to waiver of premiums when discharged in September, 1945; and was his failure to apply thereafter due to circumstances beyond his control? That is to say, would this veteran have made timely application for waiver of premiums had he been advised by the military, that he actually was suffering from a pernicious and fatal disease?

The fact that the deceased insured veteran did not make an application for waiver after 1948, was adequately dealt with by the Trial Court who said " . . . but the Court's further finding that the fact that he was found to have Hodgkins disease in 1948

did not in and of itself make this insured aware of the fact that he may have been continuously and totally disabled at the time of his discharge, or lapse of his insurance, because he was discharged after medical examination by the Navy as being fit and he in his own mind may have therefore believed he was not totally disabled, whereas, in fact he was". (R. 80). In addition, when the veteran and his father did go to the regional Veterans Administration Office, he was advised he had no rights in connection with the policy at that time. (R. 67).

IV

As to Appellant's Motion for New Trial, the Denial thereof, was not error. The refusal to hear additional evidence proffered after trial is not error, where such evidence is (1) argumentative; (2) stale; and (3) known to movants before or during trial. Federal Rules of Civil Procedure, 59(b); *Buder v. Fiske*, (C.A. 8, 1949) 174 F. (2d) 260; *Champion Spark Plug Co. v. Sanders*, (D.C. N.Y. 1945) 63 F. Supp. 345. And especially so, where the lack of diligence appears affirmatively from the Affidavit of Movant. (R. 40).

CONCLUSION

Review of Appellant's brief reveals a complete lack of modern authority for the prepositions advanced therein. Appellant takes issue with the Kershner case, and even urges the Court to reconsider its decision therein. Appellant further relies on authority divorced from the field of National Service Life Insurance, and accordingly divorced from all of the facts and conditions on connection therewith. No authority cited by appellant detracts in any way from the position of the Appellee in this appeal.

Appellee therefore prays that the Judgment of the District Court be affirmed.

Respectfully submitted,

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No. 15318

United States
Court of Appeals
for the Ninth Circuit

ROBERT F. ELLISON and CLEO A. (ELLI-
SON) WALKER, Appellants,

vs.

WILLIAM E. FRANK, United States District
Director of Internal Revenue for the District
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Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Southern Division

FILED

JAN - 7 1957

PAUL P. O'BRIEN, CLERK

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NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney

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Assistant United States Attorney

324 Federal Building
Tacoma, Washington

Attorneys for the Defendant-Appellee.



In the District Court of the United States, Western District of Washington, Northern Division

Civil No. 1938

ROBERT F. ELLISON and CLEO A. (ELLISON) WALKER, Plaintiffs,

vs.

WILLIAM E. FRANK, United States District Director of Internal Revenue for the State of Washington and The Territory of Alaska, Defendant.

COMPLAINT

Plaintiffs complain and allege:

1. This is an action brought pursuant to 28 U.S.C. Section 1340, to recover tax monies erroneously and illegally collected from plaintiffs by defendant, who at all times herein mentioned was and now is the duly appointed, qualified and acting United States District Director of Internal Revenue for the State of Washington and the Territory of Alaska, together with interest on said tax monies. At all times herein mentioned plaintiffs were husband and wife and were citizens and residents of the State of Washington, and were and now are citizens of the United States.

2. On or about March 15, 1950, plaintiffs filed with the defendant their income tax return on Form 1040 for the calendar year 1949 prepared on a cash basis, and the income tax liability disclosed on said return has been paid.

3. An internal revenue agent made an examination of plaintiffs' income tax return for the year 1949 and in a letter dated February 16, 1953, (Form 1200) addressed to plaintiffs, the defendant enclosed a copy of the report of examination dated November 28, 1952, which proposed a deficiency of \$11,839.10; the defendant assessed plaintiffs with deficiency in income taxes in the sum of \$11,839.10 for the calendar year 1949 and interest on said sum; that said deficiency resulted from the inclusion in plaintiffs' taxable income as ordinary income the profit received from the cutting and sale of standing timber, which standing timber plaintiff had had an exclusive right to cut for more than six months prior to the time they commenced to log the same.

4. On the 11th day of December, 1953, plaintiffs paid to the defendant a sum sufficient to cover the asserted 1949 deficiency of \$11,839.10 plus interest thereon to the date of said payment.

5. On February 24, 1954, plaintiffs filed a refund claim for the 1949 deficiency paid on December 11, 1953, plus interest, which refund claim sets forth the reasons why refund should be granted; a substantial copy of said refund claim is hereto attached as Exhibit I and is incorporated herein by reference.

6. More than six months have elapsed since the filing of said refund claim on February 24, 1954, but defendant has refunded no part thereof, and all conditions precedent to defendant's duty to refund said overpayment and interest have been performed and have occurred.

7. Plaintiffs demand trial by jury of all issues in this action.

Wherefore, plaintiffs demand judgment against defendant for \$14,505.33 being \$11,839.10 in principal and \$2,666.23 in interest paid by plaintiffs on 1949 deficiency, or whatever sum is due plaintiffs, plus interest thereon at the rate of 6% per annum from December 11, 1953 until paid together with plaintiffs' costs of suit herein.

/s/ WILLIAM F. HENNESSEY

JOHN L. FLYNN

HUGH B. COLLINS

Attorneys for Plaintiff

[Endorsed]: Filed Sept. 2, 1954.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant, William E. Frank, District Director of Internal Revenue for the State of Washington and the Territory of Alaska, by his attorneys, Charles P. Moriarty, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service, and in answer to the plaintiffs' complaint herein:

I.

Denies the allegations contained in said complaint not admitted, qualified or specifically referred to below.

II.

Further answering plaintiffs' complaint:

1. Denies the allegations contained in paragraph 1 of the complaint but admits that this purports to be an action for the recovery of internal revenue taxes; admits that the defendant has been the District Director of Internal Revenue for the State of Washington and the Territory of Alaska from October 31, 1952 to the present time; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations that the plaintiffs were husband and wife, citizens and residents of the State of Washington or citizens of the United States.

2. Denies the allegations contained in paragraph 2 of the complaint but admits that on or about March 15, 1950, the plaintiffs filed their income tax return on Form 1040 for the calendar year 1949, prepared on a cash receipts and disbursements basis and the income tax liability disclosed on said return has been paid.

3. Denies the allegations contained in paragraph 3 of the complaint but admits that an internal revenue agent made an examination of plaintiffs income tax return for the year 1949 and in a letter dated February 16, 1953 (Form 1200) addressed to plaintiffs, the defendant enclosed a copy of the report of examination dated November 28, 1952, which proposed a deficiency of \$11,839.10; that the Commissioner of Internal Revenue assessed against the plaintiffs a deficiency in income tax in the sum

of \$11,839.10 for the calendar year 1949, together with interest; that said deficiency resulted from the inclusion in plaintiffs' taxable income as ordinary income the profit received from the cutting and sale of standing timber.

4. Denies the allegations contained in paragraph 4 of the complaint but admits that the taxpayer paid the deficiency assessed for the year 1949 in the amount of \$11,839.10 in tax and \$2,661.04 in interest, a total of \$14,500.14 subsequent to December 24, 1953.

5. Denies the allegations contained in paragraph 5 of the complaint but admits that on February 24, 1954, the plaintiffs filed a claim for refund for the year 1949 and that a copy of the said refund claim is attached to the complaint as Exhibit I but denies the substantive allegations contained in the said claim for refund.

6. Denies the allegations contained in paragraph 6 of the complaint but admits that more than six months have elapsed since the filing of the said claim for refund and that no part of the amount so claimed has been refunded to the plaintiffs.

First Affirmative Defense

The plaintiffs are limited to a recovery, if any, which is based upon the decision of this Court that the income received from the sale of certain timber is reportable by the plaintiffs as capital gain and not as ordinary income since no other issue is raised by the claim for refund or the complaint.

Wherefore, the defendant prays that the plain-

tiffs' complaint be dismissed and defendant be allowed his costs and disbursements.

/s/ CHARLES P. MORIARTY

United States Attorney

/s/ THOMAS R. WINTER

Special Assistant to the Regional

Counsel, Internal Revenue Service

Acknowledgment of Service Attached.

[Endorsed]: Filed July 26, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION

To the above named defendant and his attorneys of record:

Plaintiffs request defendant within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial:

1. That during the year 1948 and prior to the removal of any timber involved in this litigation, Robert F. Ellison expended \$174,031.06 as listed below for the sole purpose of enabling him to harvest such timber:

Construction of permanent roads	\$76,578.06
Road machinery and dump trucks	17,806.57
Logging trucks and trailers	42,504.08
Logging equipment	29,346.10
Repair and service truck and miscellaneous equipment	7,796.25

2. Neither Northwest Door Company nor Van-

couver Plywood Corporation claimed capital gain on the removal or on the sale of any timber involved in this action.

3. United States Department of Agriculture Forest Service Contract A6 fs-16060 was performed and discharged by performance prior to February 16, 1953.

4. On December 11, 1953, plaintiffs paid to defendant \$11,839.10 as the amount of the deficiency referred to in paragraph 7 of the agreed facts, and \$2,661.04 as interest thereon.

5. During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self-employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest.

6. The Treasury Department does not deny capital gains treatment to the purchasers of timber from any federal or state agency including the Department of Agriculture where the purchaser cuts, sells, or uses said timber after having held the purchase contract for more than 6 months prior to the beginning of the taxable year in which the timber is utilized or sold.

7. That Northwest Door Company loaned Robert F. Ellison \$100,000.00 for the purpose of enabling him to cut and remove timber from the said tract.

8. If Robert F. Ellison had a contract right to cut said timber for sale or use in his business (and we do not ask that you admit that he had such

right) he owned said right for more than 6 months prior to the commencement of the tax year in which he cut the timber.

9. If Robert F. Ellison owned said timber (and we do not ask that you admit such ownership) he owned it for more than 6 months prior to the commencement of the tax year in which it was cut.

10. If Robert F. Ellison owned an economic interest in said timber (and we do not ask you to admit that he owned such interest) he owned such economic interest for more than 6 months before the beginning of the tax year in which the timber was cut.

11. Any right, title or interest whatever that Robert F. Ellison owned in said timber was owned by him for more than 6 months prior to the commencement of the tax year in which the timber was cut.

Dated this 6th day of March, 1956.

/s/ JOHN L. FLYNN

Attorney for Plaintiffs

Acknowledgment of Service Attached.

[Endorsed]: Filed March 7, 1956.

[Title of District Court and Cause.]

REPLY TO REQUEST FOR ADMISSIONS

State of Washington

County of King—ss.

William E. Frank, first being duly sworn, deposes and says:

1. I am the defendant in the above-entitled action.

2. I have carefully read the request for admissions served upon my counsel by plaintiffs on March 7, 1956.

3. I cannot truthfully admit or deny the matters stated in paragraphs 1 and 7 thereof, because those matters are not within my knowledge.

4. Paragraph 4 thereof is denied, because the payment made by plaintiffs to me on December 11, 1953, included other taxes besides those referred to in paragraph 7 of the agreed facts. A portion of this payment of taxes for 1949 related to a disallowance of claimed deductions in the total amount of \$478.00.

5. Paragraph 5 thereof is specifically denied.

6. Paragraphs 8-11 thereof are specifically denied, except that it is admitted that whatever interest Robert F. Ellison may have had in the timber under Contract A6-fs-16060 dated from December 9, 1947.

/s/ WILLIAM E. FRANK

Subscribed and sworn to before me this 13th day of March, 1956.

[Seal] /s/ C. W. CATHEY

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had, whereat the plaintiffs were represented by William F. Hennessey, John L. Flynn, and Hugh B. Collins, and the defendant by Charles P. Moriarty, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service, their attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1.

That Robert F. Ellison and Cleo A. (Ellison) Walker were husband and wife, citizens and residents of the State of Washington during the calendar year 1949, and that they were during that year and are now citizens of the United States.

2.

That Robert F. Ellison and Cleo A. (Ellison) Walker during the year 1949 filed a joint Federal income tax return with the District Director of Internal Revenue at Tacoma, Washington, and that they made payment of Federal income taxes for the year 1949 in the amount of \$6,685.98 to said District Director prior to the due date of said return. Cleo A. (Ellison) Walker is involved in this case solely because of the filing of a joint income tax

return. Robert F. Ellison and Cleo A. (Ellison) Walker are referred to hereinafter as "taxpayers." A true copy of the taxpayers' joint return is attached as Pretrial Exhibit 1.

3.

That on or about September 4, 1947, the Northwest Door Company, a Washington corporation, entered into what is designated as a timber sale agreement with the United States Department of Agriculture Forest Service, said contract being on Form 202, Rev. June, 1942, and numbered A6 fs-16060, a copy of which contract and related documents is attached as Pretrial Exhibit 2.

4.

That on or about December 9, 1947, the Northwest Door Company, a Washington corporation, and the Vancouver Plywood Corporation, a Washington corporation, entered into an agreement with Robert F. Ellison. A true copy of said agreement is attached as Pretrial Exhibit 3.

5.

That during the year 1949 the plaintiffs removed 15,612.901 feet (board measure) of timber from the property covered in the timber sale agreement (Pretrial Exhibit 2) herein; that the plaintiffs reported capital gains in the amount of \$50,380.06 as derived from the cutting of said timber on their Federal income tax return for the calendar year 1949; that the said taxpayers paid the Federal income taxes on gains from the cutting of the timber at the rates applicable to capital gains for the cal-

endar year 1949; that the said taxes were paid to the District Director of Internal Revenue at Tacoma, Washington.

6.

That an internal revenue agent made an examination of the Federal income tax return for the calendar year 1949 filed by the plaintiffs; that the report of the revenue agent asserted a deficiency of income tax for the calendar year 1949 in the amount of \$11,839.10, which was based on the inclusion of \$50,380.06 as ordinary income derived from the contract with the Northwest Door Company and Vancouver Plywood Corporation dated December 9, 1947, instead of a long-term capital gain under Sec. 117 (k) of the Internal Revenue Code, as reported by the taxpayers.

7.

That on December 24, 1953, the Commissioner of Internal Revenue assessed a deficiency in income tax of \$11,839.10 and interest of \$2,661.04 against the taxpayers; this deficiency resulted in its contested part from the inclusion in income of the taxpayers for 1949 of \$50,380.06 as ordinary income derived from the contract with the Mutual Door Company and Vancouver Plywood Corporation dated December 9, 1947, instead of a long-term capital gain under Sec. 117 (k) of the Internal Revenue Code, as reported by the taxpayers on their 1949 joint income tax return. That on December 10, 1953, the taxpayers remitted to the District Director of Internal Revenue at Tacoma,

Washington, an amount in excess of the deficiency assessed for the year 1949, which amount was recorded in a suspense account, No. 9-B-5414, and subsequently credited to the taxpayers' account in payment of their liability for the deficiency assessed on December 24, 1953.

8.

That the taxpayers filed a claim for refund for the calendar year 1949; that the Director of Internal Revenue has neither communicated with the taxpayers nor has he accepted or rejected the said refund claim; that more than six months have elapsed since the filing of the said claim for refund and that no part thereof has been refunded to the taxpayers.

Plaintiffs' Contentions

1.

On December 11, 1953, plaintiffs paid to defendant \$11,839.10 as the amount of the deficiency referred to in paragraph 7 of the agreed facts, and \$2,661.04 as interest thereon.

2.

During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest.

3.

Said timber referred to in paragraph 5 of the agreed facts was removed by Robert F. Ellison and sold by him in the course of his business.

4.

Robert F. Ellison had a contract right to cut said timber for sale or use in his business, and he owned said right for more than 6 months before the beginning of the taxable year in which he cut the timber.

5.

Robert F. Ellison owned said timber at the time he cut it, and owned it for more than 6 months before the beginning of the taxable year in which he cut the timber.

6.

Robert F. Ellison owned an economic interest in said timber at the time he cut it, and owned such economic interest for more than 6 months before the beginning of the taxable year in which he cut the timber.

Defendant's Contentions

1.

That the contract of December 11, 1947, between Robert F. Ellison and Northwest Door Company and Vancouver Plywood Corporation was a contract of employment by the corporations of Robert F. Ellison as a logger who was entitled only to compensation for his services measured by the market value of the logs.

2.

That Robert F. Ellison was not the owner of a contract right to cut the timber contained on the tract purchased by Northwest Door Company and

Vancouver Plywood Corporation from the United States Department of Agriculture.

3.

That Robert F. Ellison was not entitled to the benefits of Section 117(k)(1) I.R.C. (1939) as claimed on timber removed by him during the year 1949.

Issues of Law

1.

The plaintiffs contend that the following is the issue before the court:

Whether plaintiffs were entitled on their said income tax return to report any gain realized on the removal or on the sale of said timber as capital gain, and to be taxed thereon only at the capital gains rate.

2.

The defendant contends that the following is the issue before the court:

Whether the performance of the contract dated December 9, 1947 (Pretrial Exhibit 3) between Robert F. Ellison, Northwest Door Company, and Vancouver Plywood Corporation was sufficient to establish for the purpose of Section 117 (k)(1) of the Internal Revenue Code of 1939 that timber was cut (for sale or for use in the taxpayers' trade or business) during 1949 by Robert F. Ellison and whether he owned or had such contract right to cut such timber for a period of more than 6 months prior to January 1, 1949.

Exhibits

The exhibits of all parties below listed were produced and marked, and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Each party waives the objection that any such exhibit is a copy rather than the original.

1. Plaintiffs' income tax return for 1949.
2. United States Department of Agriculture Forest Service contract A6 fs-16060 and related documents.
3. Contract dated December 9, 1947, executed by Robert F. Ellison, Northwest Door Company, and Vancouver Plywood Corporation.
4. Claim for refund of income taxes for 1949 filed by plaintiffs. Attached to complaint.
5. Statutory notice of deficiency, year 1949.
6. Minutes of meeting October 24, 1947, Vancouver Plywood Corporation; present: J. Power, C. Hovey, H. E. Tenzler, and Geo. Raknes, re contract with Robert F. Ellison.
7. Memo of August 4, 1948, from Geo. Raknes to H. E. Tenzler.
8. Northwest Door Company's ledger account with Robert F. Ellison.
9. Two Northwest Door Company disbursement vouchers dated March 10 and October 25, 1949, and settlement sheet dated March 9, 1949.
10. Plaintiffs' 1947 income tax return. Separate returns.
11. Plaintiffs' 1948 income tax return. Separate returns.

12. Robert F. Ellison's account books for 1947 through 1949, and records for 1949.

13. [Cancelled.]

14. Exoneration of bond which is a part of Exhibit 2.

Action By The Court

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated at Tacoma, Washington, this 15th day of March, 1956.

/s/ GEO. H. BOLDT

United States District Judge

Form Approved:

/s/ WILLIAM F. HENNESSEY

Attorney for Plaintiffs

CHARLES P. MORIARTY

/s/ By K. W. MELCHIOR

Attorney for Defendant

[Endorsed]: Filed March 15, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before the Court at Tacoma, Washington, on March 15 and 16, 1956. Plaintiff's were represented by John L. Flynn and Hugu B. Collins, Esqs., and defendant was represented by Charles P. Moriarty, Esq., United States Attorney, Guy A. B. Dovell, Esq., Assistant United States Attorney, and Kurt W. Melchior and Theodore D. Taubeneck, Esqs., Attorneys, Department of Justice, Washington 25, D. C.

The Court, having considered the evidence and exhibits adduced by the parties and the arguments of counsel, being fully advised in the premises, and having heretofore rendered an oral opinion, now finds the facts herein and states its Conclusions of Law, as follows:

Findings of Fact

1. Plaintiffs were, at the times material hereto, husband and wife, residing in the State of Washington. As such they filed their joint income tax return for the year 1949 with the Collector of Internal Revenue for the District of Washington and paid the tax shown thereon to be due.

2. Thereafter the Commissioner of Internal Revenue caused an examination of this return to be made, and upon audit assessed a deficiency in income taxes for the year 1949 against plaintiffs in the amount of \$11,839.10, with interest, all of which

plaintiffs paid to the defendant on or about December 10, 1953. Defendant then was and now is the District Director of Internal Revenue for the District of Washington, with residence in this judicial District.

3. Thereafter plaintiffs filed a timely claim for refund of said deficiency payment, and more than six months later they commenced this action to recover such taxes.

4. In 1947, the United States, through the Forest Service of the Department of Agriculture, owned the fee to certain timber lands on the Green Fork River in what is now the Gifford Pinchot National Forest, in the State of Washington. The Forest Service was then in the process of offering to sell the timber on said tract to the public under a pay-as-cut contract, providing for payment for the timber as it was cut.

5. Theodore Franklin Wall, an employee of Northwest Door Company, in 1947 had the duty of procuring logs for that company. Plaintiff Ellison was a logger. Wall heard of the probable sale of the Green Fork timber by the Forest Service; he also knew of Ellison's interest in logging operations. Wall therefore induced Ellison to inspect the Green Forks tract with him. Wall's purpose was to obtain a supply of logs for his employer, Northwest Door Company. As a result of these preliminaries, Northwest Door Company became interested in obtaining the logs off the Green Forks timber, and Ellison in conducting the logging operations.

6. The Forest Service awarded the Green Forks timber and the contract right to cut that timber to Northwest Door Company by Contract Form 202, No. A6 fs-16060. This contract by its terms provided that Northwest Door would purchase, cut and pay for the timber from the Green Forks tract. Title to the timber remained in the United States until after the timber had been felled, scaled, paid for, etc., and then passed to Northwest Door Company. Northwest Door Company was financially liable to the United States for performance of the contract.

7. Ellison is not mentioned in Contract A6 fs-16060. Neither title to the timber nor the contract right to cut the timber ever lay in Ellison.

8. Northwest Door Company was interested in the Green Forks timber for its plywood operations rather than for any profit from the logging. Ellison became a contract logger for Northwest Door Company on the Green Forks tract, and received large advances of operating funds from Northwest Door Company in that connection. Northwest Door Company and Ellison entered into a contract, drafted by an able and experienced attorney, which provided in part as follows:

(a) Northwest Door Company was described as the Owner of the timber;

(b) Ellison was described as a logger;

(c) Ellison agreed to "fall, buck, yard, load and transport to navigable water * * * all of the timber" on the Green Forks tract;

(d) Ellison agreed to assume certain of the costs of the logging;

(e) Ellison undertook to perform all conditions required of Northwest Door Company under the Forest Service contract, and to keep that company harmless from all claims in connection with his logging operations;

(f) All logs, timber and forest products on the Green Forks tract were to remain the property of Northwest Door Company and another company, and Ellison was to have no right, title or interest therein other than the right to receive his compensation under the contract;

(g) Ellison was to be paid the Columbia River market price of the logs for his logging services, in full payment and discharge of Northwest's obligations to him;

(h) Northwest Door Company was to advance reasonable amounts of operating capital to Ellison, for which it could withhold portions of the sums due Ellison under (g) above.

9. The foregoing contract was drafted after a full exploration of the situation by all concerned, and reflected the intentions of the parties precisely. Its provisions are clear and unambiguous. If the contract be subject to parol construction, then the evidence fully shows that the contract meant what it said.

10. Ellison had no right, title or interest in the timber at any time. He was to perform the service of logging the timber for Northwest Door Company

and was to be paid for his services only. The payment was to be measured by the market value of the logs. Title to the timber lay at all pertinent times only in the United States and in Northwest Door Company, but not in Ellison.

11. Taxpayers bore the economic risk of the logging operations on the Green Forks tract, but in the absence of any right, title or interest in the timber on their part that fact is not relevant. Neither is it material that Northwest Door Company, which was not interested in economic gain on the logging operation and wanted only the logs at their Columbia River market price, had no gain or loss on the logging operation and therefore did not claim any capital gain thereon.

12. Ellison's logging contract had extended over a period in excess of six months when he received payments for logging services from the Northwest Door Company in 1949, and plaintiffs reported the excess of these payments over their costs on their 1949 income tax return as capital gain from the cutting of timber they owned or had a contract right to cut, for use in their own business or for sale. The Commissioner of Internal Revenue held that Ellison did not own the timber, nor was he buying it under a contract right to cut the timber, nor did he cut it for sale or for use in his own business, and that therefore the proceeds from his logging operations were taxable to the taxpayers as ordinary income. It is this determination which gave rise to the present dispute.

13. The present taxpayers did not at any time own or have a contract right to cut the Green Forks timber, nor did they cut said timber for use in their own business or for resale. The Commissioner correctly determined that the gain from Ellison's logging operations was taxable to the taxpayers as ordinary income. Taxpayers did not overpay any tax and are entitled to no recovery.

14. During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self-employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest.

Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter of this action.

2. A logger who has or obtains no right, title or interest in the timber which he cuts may not elect to report the gain from his logging operations as capital gain under Sections 117(k)(1) or 117(k)(2) of the Internal Revenue Code of 1939, 26 U.S.C. Sec. 117 (1952 ed.). *Carlen v. Commissioner*, 220 F. 2d 338 (C.A. 9th). In that connection it is not material whether the contract logger assumes all or any part of the economic risk of the logging operation. A taxpayer must have an interest in the nature of title in the timber in order to avail himself of the election provided by that statute.

3. The defendant acted properly and lawfully in collecting the taxes complained of herein.

4. Plaintiffs are not entitled to any recovery from the defendant. The defendant is entitled to a judgment of dismissal of this action with prejudice.

Done in open Court this 22nd day of June, 1956.

/s/ GEO. H. BOLDT,

United States District Judge

Presented by:

/s/ GUY A. B. DOVELL,

Assistant United States Attorney

Approval restricted to form only:

/s/ HUGH B. COLLINS,

Of Counsel for Plaintiffs

[Endorsed]: Filed June 22, 1956.

United States District Court, Western District
of Washington, Southern Division

Civil No. 1938

ROBERT E. ELLISON and CLEO A. (ELLI-
SON) WALKER, Plaintiffs,

v.

WILLIAM E. FRANK, UNITED STATES DIS-
TRICT DIRECTOR OF INTERNAL REV-
ENUE FOR THE STATE OF WASHING-
TON and THE TERRITORY OF ALASKA,
Defendant.

JUDGMENT

The Court having considered the evidence and the arguments of counsel and entered its Findings of

Fact and Conclusions of Law herein, it is in conformity therewith

Ordered, Adjudged and Decreed that the plaintiffs take nothing from the defendant, and that their action be and it hereby is dismissed with prejudice, and that the defendant have and recover his costs herein from the plaintiffs.

Done in open Court this 22nd day of June, 1956.

/s/ GEO. H. BOLDT,

United States District Judge

Presented and approved by:

/s/ GUY A. B. DOVELL,

Assistant United States Attorney

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William E. Frank, United States District Director of Internal Revenue for the State of Washington and the Territory of Alaska, Defendant herein, and to: Thomas R. Winter, Assistant Regional Counsel, Internal Revenue Service, and to: Charles P. Moriarty, United States Attorney, Attorneys for the Defendant:

Notice Is Hereby Given that Robert F. Ellison and Cleo A. (Ellison) Walker, plaintiffs above named, appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein on the twenty-second day of June, 1956, by the United States District Court,

Western District of Washington, Southern Division, in favor of the Defendant and against the Plaintiffs.

Dated August 15, 1956.

/s/ JOHN L. FLYNN,

Attorney for Appellants

Affidavit of Service Attached.

[Endorsed]: Filed Aug. 18, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS

In their appeal herein, the appellants intend to rely on the following points:

1. The Court erred in failing to find that certain timber contained on what is referred to in these proceedings as the Green Forks Tract, subject to contract between Northwest Door Company and Robert F. Ellison was removed by Robert F. Ellison and sold by him in the course of his business.

2. The Court erred in failing to find that Robert F. Ellison had a contract right to cut said timber for sale or use in his business, and that he owned said right for more than six months before the beginning of the tax year in which he cut the timber.

3. The Court erred in failing to find that Robert F. Ellison owned said timber at the time he cut it, and owned it for more than six months before the beginning of the tax year in which he cut the timber.

4. The Court erred in failing to find that Robert F. Ellison owned an economic interest in said timber at the time he cut it, and owned such economic interest for more than six months before the beginning of the tax year in which he cut the timber.

5. The Court erred in failing to find that Robert F. Ellison was the beneficiary of the contract, Exhibit 2, made between Northwest Door Company and the United States Department of Agriculture for the removal of timber referred to in these proceedings as the "Green Forks Tract" and that the said Robert F. Ellison was at all times material herein the owner of equitable title to the timber and logs obtained therefrom.

6. The Court erred in failing to find that the plaintiffs are entitled to recovery of not less than the sum of \$11,361.10 from the defendant.

7. The Court erred in dismissing this action with prejudice.

8. The Court erred in ordering judgment in favor of the defendant and against the plaintiffs.

/s/ JOHN L. FLYNN,
Attorney for Appellant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 18, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers, pleadings and exhibits in the above entitled cause as are designated by the written Designations of the parties hereto, and that the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above entitled Court, filed and entered on June 22, 1956, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Complaint (exhibit omitted) Filed Sept. 2, 1954)
2. Amended Answer (filed July 26, 1955)
3. Plaintiffs' Request for Admissions (filed Mar. 7, 1956)
4. Defendant's Reply to Request for Admissions (filed Mar. 14, 1956)
5. Pretrial Order (filed and entered Mar. 15, 1956)

6. Reporter's Transcript of Proceedings of 6/22/56 (filed 6/27/56)

7. Findings of Fact and Conclusions of Law (filed and entered June 22, 1956)

8. Judgment (filed and entered June 22, 1956)

9. Plaintiffs' Notice of Appeal (filed Aug. 18, 1956)

10. Statement of Points (filed Aug. 18, 1956)

11. Plaintiffs' Designation of Contents of Record on Appeal (filed Aug. 18, 1956)

12. Defendant's Designation of Additional Contents of Record on Appeal (filed Aug. 30, 1956)

13. Affidavit of Service of Defendant's Designation (filed Aug. 30, 1956)

14. Reporter's Transcript of Proceedings (of Mar. 15 and 16, 1956—in 2 volumes) (filed Mar. 24, 1956)

I further certify that as part of the Record on Appeal I am transmitting herewith the following exhibits admitted in evidence in the trial of the above entitled cause, to-wit:

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 & 9, and Defendant's Exhibit A.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto in the preparation of the Record on Appeal in said cause, to-wit: Notice of Appeal, Plaintiffs: \$5.00, and that the said fee of \$5.00 has been paid to the Clerk by the Plaintiffs.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers, pleadings and exhibits in the above entitled cause as are designated by the written Designations of the parties hereto, and that the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above entitled Court, filed and entered on June 22, 1956, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Complaint (exhibit omitted) Filed Sept. 2, 1954)
2. Amended Answer (filed July 26, 1955)
3. Plaintiffs' Request for Admissions (filed Mar. 7, 1956)
4. Defendant's Reply to Request for Admissions (filed Mar. 14, 1956)
5. Pretrial Order (filed and entered Mar. 15, 1956)

6. Reporter's Transcript of Proceedings of 6/22/56 (filed 6/27/56)

7. Findings of Fact and Conclusions of Law (filed and entered June 22, 1956)

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I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto in the preparation of the Record on Appeal in said cause, to-wit: Notice of Appeal, Plaintiffs: \$5.00, and that the said fee of \$5.00 has been paid to the Clerk by the Plaintiffs.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Tacoma, Washington, this 24th day of September, 1956.

[Seal] MILLARD P. THOMAS,

Clerk,

/s/ By E. E. REDMAYNE,

Deputy

In the District Court of the United States for the
Western District of Washington,
Southern Division

No. 1938

ROBERT F. ELLISON and CLEO A. (ELLISON) WALKER,
Plaintiffs,

VS.

WILLIAM E. FRANK, UNITED STATES DISTRICT DIRECTOR OF BUREAU OF INTERNAL REVENUE, STATE OF WASHINGTON, TERRITORY OF ALASKA,
Defendant.

TRANSCRIPT OF PROCEEDINGS

in the above-entitled and numbered cause had before the Honorable George H. Boldt, United States District Judge, on the 15th and 16th days of March, 1956, Federal Building, Tacoma, Washington.*

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Appearances: John L. Flynn, Esq., 613 United States National Bank Building, Portland, Oregon; and Hugh B. Collins, Esq., 107 E. Main Street, Medford Oregon, appeared on behalf of the Plaintiffs.

Thomas R. Winter, Esq., Assistant Regional Counsel, Internal Revenue Service, United States Courthouse, Seattle, Washington; and Kurt W. Melchior, Esq., Attorney, Tax Division, Department of Justice, Washington, D. C.; and T. D. Taubeneck, Esq., Attorney, Tax Division, Department of Justice, Washington, D. C., appeared on behalf of the Defendant.

Proceedings

(Plaintiffs' Exhibits Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14 marked for identification prior to trial.)

Mr. Collins: Before making the opening statement there is one matter that counsel for both sides would like to call to the Court's attention. On the 7th day of this month certain requests for admissions of facts were served by the plaintiffs upon the defendant and the defendant responded to these but there was one request, number three, that was not either admitted or denied.

Counsel informs me that it was his intention to admit it by failure to deny it. Yet it will not become admitted by option of law until the 17th of this month since the ten-day period will not be up. And Mr. Melchior has very kindly consented

he will stipulate that the plaintiffs' request for admission number three is admitted.

Mr. Melchior: That is correct, your Honor.

The Court: Thank you.

Mr. Melchior: Well, while we are on that point, although it may be a little preliminary, we made certain partial admissions in our response and although the ten days have not yet expired and will not have expired, as I assume, when this case is submitted, such admissions as [1] are contained in that request I think the Plaintiffs may rely on in so far as the defendant is concerned.

The Court: Thank you.

Mr. Collins: In addition to that, there has been an objection interposed to one of the requests for admission but we may not ever come to that point, so we are not going to ask your Honor to rule on it until we do.

The Court: Very good rule to follow. Got enough problems to solve.

Mr. Collins: Briefly, what this case is about, what the Plaintiff proposes to prove is certain timber was purchased from the Department of Agriculture Forest Service; that the Plaintiff became the owner of the timber. I use it not in the strict sense of legal title, but in the sense ownership is generally understood. And that he held such ownership for more than six months prior to the commencement of the tax year in which he thereafter removed timber.

The defendant admits that any interest he had, if he had an interest, was so held for more than six

months. So this case essentially reduces itself to this proposition: What was the plaintiff's interest in this timber, and we propose to show ownership as it is commonly understood by the man on the street without regard to the niceties of legal title. And aside from that I feel that the agreed [2] facts contained in the pretrial order pretty well sum up the case and such features as I have not dwelt upon in this opening statement will be adequately covered by the witnesses so that there will be no confusion or doubt as the story unrolls.

Mr. Melchior: If your Honor please, from the Government's point of view, this case is even simpler than that.

The Court: I am always concerned when everybody agrees it is a simple case. It usually turns out to be the "stinger."

Mr. Melchior: Yesterday we had some problems that were fairly subtle but today I think that since this controversy arose between the parties the Court of Appeals for this circuit has effectively foreclosed plaintiffs. Yesterday I guess the defendant was somewhat in that position, but today the Court of Appeals has foreclosed plaintiffs from much further contention. The case which we believe is completely on all fours with the situation created by the documents in this case was before the Court of Appeals in *Carlen vs. Commissioner*, 220 Fed. (2d), 338. I sent the citation into your chambers this morning.

The Court: Thank you. I haven't had an opportunity to look at it.

Mr. Melchior: And that case, of course, was [3]

decided after this controversy arose, but there is no question in our minds that the situation is entirely the same. Listening to Mr. Collins just now, I think that probably the issue is quite narrow. We must recognize the effect of the Carlen case and in order to come within the ruling of that case they have got to show that ownership in the sense of title lies in them. And the statement was made a moment ago that they are going to show ownership, without reference to the niceties of legal title, is going to lie in them. I don't think they can do it, but I think moreover they are foreclosed from trying it because title and all of the rights of the parties are established in writing and there isn't any occasion for any testimony to construe. That is our position.

The Court: Yes, very well, go ahead.

Mr. Collins: The plaintiff will call the first witness, Mr. Tenzler. [4]

H. E. TENZLER

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs, and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: H. E. Tenzler, T-e-n-z-l-e-r.

Q. What is your occupation, Mr. Tenzler?

A. I am President of Northwest Door Company, Tacoma, Washington.

(Testimony of H. E. Tenzler.)

Q. Were you connected with Northwest Door Company during 1947?

A. Yes, I was President and General Manager at that time.

Q. And have you continued to head the company from 1947 to the present time?

A. Yes, I have.

Q. Now generally, what type of product does Northwest Door Company manufacture?

A. Northwest Door Company manufactures plywood, fir plywood and fir doors.

Q. Now in the course of the manufacturing operations do they use all kinds of logs or are their requirements generally speaking limited to what is called peelers? [5]

A. The fir plywood division of our company requires a higher type of log which, as you say, is the peeler type, the better grades.

Q. Now, did Northwest Door Company do any logging during the year 1947?

A. In 1947 Northwest Door did not do any logging.

Q. Where did Northwest Door Company at that time acquire the majority of the logs that were used?

A. In 1947 we procured virtually all of our logs on the open market.

Q. Did Northwest Door Company ever buy timber from loggers in 1947 and prior years?

A. Yes, we did.

(Testimony of H. E. Tenzler.)

Q. Now, how were these timber purchases generally handled?

The company would assist the loggers to obtain the timber and in return would make a contract with the loggers, would sell the timber to the loggers and in return would have an agreement with the loggers to sell the logs to the company at the prevailing market prices.

Q. How did Northwest Door Company secure repayment of advances to themselves and secure that the logger would carry out his undertaking to sell the logs back to Northwest Door Company?

A. To protect our advances and other interests?

Q. Yes.

A. We would have written contracts and agreements to that effect.

Q. Who determines just exactly what wording was to go into the contracts?

A. The company counsel took care of our interests in that matter.

Q. And in 1947 who was the company counsel?

A. Mr. Eisenhower.

Q. Did Northwest Door Company retain any rights or interest in these stands of timber after turning them over to the loggers?

A. Rights that we retained were to protect our interests, the money we may have advanced, and to see to it that there was a proper performance, contract on which the company may be involved and the right to purchase the logs from the logger at prevailing market prices or to have the first

(Testimony of H. E. Tenzler.)

privilege of purchasing the logs at prevailing market prices.

Mr. Melchior: May I have that answer read?

(Whereupon, the reporter read back the last answer.)

Q. Now for the purposes of this next question, Mr. Tenzler, I am going to refer to a transaction by a short name. I will call it the Green Forks timber transaction. [7]

The Court: Green Forks?

Mr. Collins: Green Forks timber transaction.

Q. (Continuing) Are you in a general way familiar with that transaction? A. Yes, I am.

Q. And was Mr. Ellison involved in the Green Forks transaction? A. Yes, he was.

Q. Now you have testified concerning the general policy adopted by Northwest Door Company in financing these loggers. What is this general policy followed by your company in connection with the Green Forks transaction?

Mr. Melchior: I object. I think that he should prove his specific instruments before he gets down to any question of conforming general policy to transaction.

The Court: I think perhaps the objection is well taken. If this was evidenced by some written instrument the instrument itself should be presented before any parol explanation of its effect.

Mr. Collins: Well, your Honor, I think it might as well come out at this time, as you observed, the simplifications get difficult. It appears from the

(Testimony of H. E. Tenzler.)

agreed facts that certain written instruments were entered into in connection with this transaction, but it is our contention based upon the Washington cases, principally Winstrom vs. [8] Ransom that the defendant not being a party to these instruments is in no position to object to the parol evidence rule being——

The Court: Well, let me shorten it down to this effect, that I am going to permit you, in view of the fact this is a non-jury matter, to make a full record on your position whatever it may be. But I think it is incumbent upon the adverse party to make its objection. Now if you want leave to make a record on the thing, preserving to the Government its objection to this type of proof, it is agreeable to me to proceed in that manner and it might save time.

Mr. Collins: Entirely satisfactory.

Mr. Melchior: I appreciate this question of making a complete record, your Honor. I still insist on pressing my objection that even with respect to the preservation of the record I think the contract should be in evidence first before there is any examination attempting to interpret it.

The Court: Well I must say that I am rather inclined to that view. Do you have some authority to the contrary?

Mr. Collins: Well, your Honor——

The Court: Or if you show there was no written instrument or something of that kind, but if there was one [9] I think that we have got to start from the written instrument and work from there. At

(Testimony of H. E. Tenzler.)

least that has been my previous understanding of the rule. I could be in error, as I often am.

Mr. Collins: I think it resolves itself to this, your Honor. It is a question of order of proof and at the time the case has been completed and you look back over at what has transpired, then you are going to find that certain things were in evidence or somebody has failed to make his case. However, I think the order in which they come in is subject to the Court's discretion and largely up to the party who is putting on the case even though it may inconvenience his adversary.

The Court: Well of course I am not concerned about the matter of conveniencing or inconveniencing. All I have got to do is rule on such objections that are made and the objection is made that this was apparently covered by a written instrument at least to some effect or other. Now I think standard procedure requires that the document be produced and examined first. That is my impression of it. However, I don't see how in the world anybody can be harmed by having it out here if there was such a document. It is eventually going to come into the record one way or the other and aren't we just bothering about something that is not very important? [10]

Mr. Melchior: If your Honor please, it is identified and the formal objections to the contract are disposed of because it is Exhibit 3 to the pretrial order.

The Court: Has it been admitted in evidence?

(Testimony of H. E. Tenzler.)

Mr. Melchior: No, there are no—none of the exhibits in the pretrial order have been admitted.

The Court: Apparently all we have to do is admit the exhibits which are attached to the pretrial order and we will have accomplished the thing that your objection at the moment calls for.

Mr. Melchior: That is my only objection at the moment. I am not going to agree to the admission of all of these exhibits. As far as the pre-trial order is concerned they have been identified only and the formal objections have been waived, but there are, of course, substantive objections to some of them, none to this particular exhibit.

The Court: All right, what about it? Do you want to move for the admission of the exhibits now at this time and resolve this particular matter in that way?

Mr. Collins: Well, I feel it can do no harm, your Honor.

The Court: All right, let's do it that way. The contract is Exhibit—

Mr. Collins: Exhibit 3. [11]

The Court: —Exhibit 3. Where is that? Is that physically attached to the pretrial?

The Clerk: No, your Honor.

The Court: All right, is there any objection to the admission of Exhibit 3?

Mr. Melchior: No, your Honor.

The Court: If not, it is admitted. All right, that answers your immediate objection. All right, go ahead, Mr. Collins.

(Testimony of H. E. Tenzler.)

(Plaintiffs' Exhibit No. 3 admitted in evidence.)

[See pages 127-133.]

(Whereupon, the Reporter read back the last question.)

Mr. Melchior: I now object further on the ground the contract in evidence speaks for itself.

The Court: Your objection is noted and overruled. Go ahead.

Q. (Continuing) You may answer the question, Mr. Tenzler. Would you like to have it read back again? A. Yes.

(Whereupon, the Reporter again read back the last question.)

A. (Continuing) It was.

Q. Now was Mr. Ellison the logger that was financed in this manner by you on the Green Forks transaction? [12] A. He was.

Mr. Melchior: I don't think the witness should be lead on this point because this——

The Court: I am not going to give any weight to the leading. I mean that is not any concern and in this manner I understand the objection is probably to the form of the question but I think we needn't concern ourselves about that.

Mr. Melchior: It really goes to the substance of what the—I want to make a formal objection. The reason for my objection, if I may explain, is this, that as I explained in the opening statement the Government's position is based on the documents in the case. If there is going to be any deviation from

(Testimony of H. E. Tenzler.)

the documents attempted to be introduced on the part of the Plaintiff, I think it is very important that the witnesses rather than counsel describe what that deviation is.

The Court: Well, there isn't any question about that, but I think this is by way of preliminary. I wouldn't be inclined to go along very well with a general shotgun question and answer. I assume it is a preliminary question. In any case, you can develop it more fully, if you feel it necessary, on cross examination. Go ahead.

Q. Mr. Tenzler, did any other person, firm or corporation other than the Northwest Door Company own any [13] interest in this Green Forks timber?

A. Yes, the Vancouver Plywood Company of Vancouver, Washington.

Mr. Collins: That is all.

The Court: Cross Examine.

Cross Examination

Q. (By Mr. Melchior): Mr. Tenzler, do you know who owned title to the land in the Green Forks tract at the time that it was lumbered?

Mr. Collins: Just a moment please. I will object to that on the same ground raised by Mr. Melchior. We have a written instrument that serves as a foundation for this transaction and I believe it should be before the Court too.

The Court: Well, the question of Mr. Tenzler's knowledge of who owned the legal title might in and

(Testimony of H. E. Tenzler.)

of itself be a fact for some consideration. I am not sure, but it is possible that it would be. Accordingly the objection will be overruled. The question is, did he know who held the legal title.

A. The timber was purchased from the Forest Service.

Q. Of the United States Department of Agriculture, is that right? [14]

A. Is that the question you asked?

Q. Well, who purchased it from the Forest Service?

A. The Northwest Door Company so far as I recollect.

Q. Was that done pursuant to the contract, sir?

A. With the Forest Service?

Mr. Collins: I object to that as calling for a legal conclusion.

The Court: Overruled, overruled, go ahead.

Q. Was there a contract between the Northwest Door Company and the Forest Service pursuant to which this was purchased?

A. Yes, there was.

Q. I will show you stipulation, Exhibit 2 for identification. Is that the contract?

A. It appears to be the contract.

Mr. Melchior: The Defendant offers stipulation, Exhibit 2 for identification as its exhibit.

Mr. Collins: No objection.

The Court: Exhibit 2 is admitted.

(Plaintiffs' Exhibit No. 2 admitted in evidence.)

Q. To your knowledge, Mr. Tenzler, was there

(Testimony of H. E. Tenzler.)

any other written contract between the Department of Agriculture and the persons interested in taking the lumber off this tract other than this Exhibit 2? [15]

A. I don't believe I can answer that. I think you have other witnesses who are better qualified to answer that technical question than I am.

The Court: To your knowledge, Mr. Tenzler.

A. (Continuing) To my knowledge I don't believe there was, but I am not——

The Court: You don't know of any? That is what the question calls for. A. No.

Q. To your knowledge, Mr. Tenzler, was the Department of Agriculture advised as to the identity of the person who would conduct the actual logging on this tract?

A. I think they were advised and I think they knew about it.

Q. What was the object of your company entering into this contract with the Department of Agriculture, Exhibit 2?

A. The purpose was to assure ourselves of a supply of logs.

Q. For use in your own business?

A. That is right.

Mr. Melchoir: That is all.

The Court: Anything further?

Redirect Examination [16]

Q. (By Mr. Collins): Mr. Tenzler, referring back to Exhibit 2, that is the Forest Service con-

(Testimony of H. E. Tenzler.)

tract upon which Northwest Door Company was the successful bidder, did any other person, firm or corporation participate with Northwest Door Company on the bid?

A. With the Northwest Door? No, I do not recall.

Q. Did the Northwest Door Company agree with any other person, firm or corporation excluding Ellison that in the event the bid were successful the timber would be shared with such other person, firm or corporation?

Mr. Collins: Excuse me, your Honor. May I hand the witness an exhibit?

The Court: You may.

Mr. Collins: Give me Exhibit 3 please.

Q. (Continuing) Exhibit 3 is being handed to you, Mr. Tenzler to refresh your memory on that point.

Mr. Collins: May I approach counsel?

The Court: Yes, of course.

(Whereupon, Mr. Collins conferred with opposing counsel.)

Mr. Collins: (Continuing) Mr. Melchior has consented to stipulate to the answer to that question that Vancouver Plywood Corporation and Northwest Door Company did have an agreement between themselves to share in that timber in the event the Northwest Door bid was successful. [17]

Mr. Melchoir: We stipulate to that.

The Court: Very well, the record now shows that

(Testimony of H. E. Tenzler.)

stipulation. You needn't bother with an answer, Mr. Tenzler.

Mr. Collins: I have no further questions.

The Court: You are excused and may leave when you wish, Mr. Tenzler.

(Witness excused.) [18]

EDGAR N. EISENHOWER

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Edgar N. Eisenhower, E-i-s-en-h-o-w-e-r.

Q. Mr. Eisenhower, what is your occupation?

A. I am an attorney-at-law.

Q. Now referring to the year 1947, were you an attorney-at-law at that time?

A. Yes, sir, practicing in Tacoma.

Q. And did you have any connection with Northwest Door Company?

A. At that time I was Director, Secretary and their counsel.

Q. Now?

A. I am not now interested in any way with Northwest Door.

Q. Have you ever met Mr. Robert F. Ellison?

A. If I did I don't remember.

(Testimony of Edgar N. Eisenhower.)

Q. Have you ever heard of him?

A. Yes, sir. [19]

Q. Under what circumstances and approximately when did you first hear of Mr. Ellison?

A. The first time that I ever heard of Mr. Ellison was when Mr. Tenzler and some of his lieutenants asked me to come over to the company's office for the purpose of discussing the manner in which Northwest Door was going to finance the purchase of some timber from Mr. Ellison. That was the first time I ever heard of him and I think on that occasion——

Mr. Melchior: If your Honor please, excuse me, sir, I don't mean to interrupt—I do mean to interrupt, but I am sorry. I move that be stricken because the question as asked referred only as to time and the witness is testifying——

The Court: Something beyond that, but I am not inclined to stand on the formalities of this because after all it is a non-jury matter. Eventually I have got to decide what part of the whole testimony should be given effect.

Mr. Melchior: Surely, your Honor.

The Court: Just so you have your objection in the record.

Mr. Melchior: I just want to establish our point on that because we are trying to hold this very narrowly within documents and we are going to object to any [20] attempt to widen the issue beyond what the documents themselves contend.

The Court: You make your position very clear

(Testimony of Edgar N. Eisenhower.)

and then I will say that without the necessity of continued or further objections as far as the Court is concerned, the record will show that you strictly hue to the line of no parol evidence to alter the terms of the written documents in evidence. Is that agreeable to you so as to save further interruption?

Mr. Collins: Yes, your Honor.

The Court: Very well, and then ultimately when the evidence is in we will then consider what effect, if any, is to be given to any of the evidence. I think that will save us all time and avoid the necessity of these interruptions.

Mr. Melchior: I appreciate that.

The Court: Which, of course, are your obligation to make and I am not being critical at all.

Mr. Melchior: But we do have a continuing objection on that ground?

The Court: Very well, you have a continuing objection throughout the trial to the admission of evidence, parol evidence to alter the terms of written documents, is that correct?

Mr. Melchior: Yes, that is our position. [21]

The Court: Do you agree that they shall have that?

Mr. Collins: So agreed.

The Court: Very well, go ahead now.

Mr. Collins: Will you please read to Mr. Eisenhower the last question.

(Whereupon the Reporter read back the last question.)

The Court: Put another question, go ahead.

(Testimony of Edgar N. Eisenhower.)

Q. At that time was this timber the Green Forks timber?

A. I don't remember the name, but they had some reference and it was in an agreement that I drafted.

Mr. Collins: Will you please hand the witness Exhibit 3.

Mr. Melchior: We will agree it was the Green Forks timber.

Mr. Collins: Thank you.

The Court: And the timber referred to in Exhibit 3.

Mr. Melchior: That is all the same question, your Honor.

The Court: All right.

Mr. Collins: Possibly it would save time if we could stipulate that the timber referred to in Exhibits 2 [22] and 3 is the timber that the witnesses and counsel will refer to as Green Forks.

The Court: And which is the subject matter of this controversy.

Mr. Melchior: That is right, your Honor. We will agree.

The Court: It is understood, I have it in mind.

Q. Now on that occasion did you and the other officials of the Northwest Door Company who were present have some discussion regarding the Green Forks Timber transaction and the method of financing to be used?

A. Yes, sir.

Q. In substance—strike that please. Was this the only meeting that was held on this subject?

(Testimony of Edgar N. Eisenhower.)

A. No, sir, I think we had more than one.

Q. Now in substance what eventually was decided as a result of those meetings would be the manner in which this transaction was to be handled?

A. Mr. Collins, in order to make any sort of an answer I have got to go back a little bit beyond the date of your question. I think it was Ted Wall who lived at Woodland who came into the home office of the Northwest Door Company in Tacoma and stated that they had a piece of timber up on the Columbia River somewhere. You call it the Green Forks. He had a piece of timber up there that Mr. Ellison would like [23] to buy, and if Northwest Door Company put up the money Mr. Ellison would buy it and log it and sell Northwest Door the logs. And we had a discussion at that time, as I remember it, trying to determine how much money was going to be required to build his roads and other things, and how much money Mr. Ellison himself had which he could put into the project, and how we would secure Northwest Door for two things that they were interested in. First, the return of its money, and secondly, the acquisition of the logs that it wanted in its plywood plant. Those are the two things we were interested in.

And at that time, Mr. Collins, I didn't know anything about any interest that Vancouver Plywood had in that timber. In fact, I don't think Vancouver Plywood had any interest until the day of the bid.

(Testimony of Edgar N. Eisenhower.)

Q. Now eventually what security device was hit upon to accomplish the purpose you have stated, that of securing the Northwest Door Corporation?

Mr. Melchior: I object.

The Court: The form of the question is objectionable. It is leading and suggestive.

Q. (Continuing): Did you eventually hit upon a security device for achieving the ends that you desired to achieve?

Mr. Melchior: Same objection. [24]

The Court: I think the objection is again well taken.

Q. (Continuing): What, if anything, was eventually decided would be the manner in which the transaction would be set up so as to secure Northwest Door in the particulars you have stated?

Mr. Melchior: Same objection.

The Court: Overruled. This time I think perhaps that is a fair enough question.

A. I drafted an instrument wherein I set down what I thought was sufficient provisions for the security of Northwest Door in the two things they were interested in, one of which was to get its money back and the other was to get logs.

Mr. Collins: Hand Mr. Eisenhower Exhibit 3, please.

Q. Exhibit 3 has been handed to Mr. Eisenhower.

A. Well, the instrument that I drew was on different size paper than this. This is somebody's copy of what I did and then it has been photostated, or

(Testimony of Edgar N. Eisenhower.)

some other treatment has been given it to make copies of it. This is not the piece of paper that I prepared in my office. However, the wording may be the same.

Q. I think for purposes of this action, Mr. Eisenhower, the parties have by the pretrial order agreed that—— [25]

A. That this is it?

Q. ——you may treat that as it.

A. All right, all right.

Mr. Melchior: As what? As what Mr. Eisenhower drafted? I am afraid I can't agree to that. That is what finally resulted. That is as far as we will go.

A. (Continuing): If you have a copy of the instrument you presented to me and if the wording is the same as on that one, that is the instrument that I drew.

Mr. Collins: May I have the complaint in this action please?

A. (Continuing): I don't say these aren't my words.

The Court: I understand it. Just that that particular draft is not a copy from your office.

The Witness: That is right.

Mr. Melchior: Maybe I can save some time, your Honor. If Mr. Eisenhower would testify that the paper in front of him is in substance, is the substance of what he prepared I wonder if that would help and we could go on.

The Court: The point is, was the thing modified

(Testimony of Edgar N. Eisenhower.)

after Mr. Eisenhower drafted it originally or not, that is the question. Mr. Eisenhower doesn't want to verify this without examining the draft of his document.

Mr. Melchior: That is correct, and I can't agree—— [26]

The Court: You can't blame him for that.

The Witness: If the Court please, I know the instrument I drafted was signed by Northwest Door. That, I now see. But I don't know whether this without reading it and without comparing it with that other is a true copy of what I drafted. Now you have one which you presented to me which was a true copy. Do you remember that one?

Mr. Collins: Yes.

The Witness: Have you compared that with this?

Mr. Collins: Word for word.

The Witness: Then all right. I am willing to testify. This is the thing that I drew.

The Court: All right. We will inquire further into that if need be. Go ahead.

Q. Prior to the time you prepared this agreement did you receive any instructions from the head of the corporation as to what you were to prepare in the way of a contract or agreement?

A. Mr. Collins, I was in on the conference that decided what we would do and the job of preparing the instrument was passed over to me and I prepared it.

Q. Will you please explain in your own words

(Testimony of Edgar N. Eisenhower.)

without reference to the contract language of the instrument what it was you intended to do in drafting the instrument?

A. Mr. Collins, I had instructions from our conference [27] to draft such instrument as I thought would safeguard Northwest Door in the advances which it was making to Mr. Ellison, and secondly, to see that Mr. Ellison delivered to Northwest Door the logs which Northwest Door wanted to use in its plywood plant. Those were my instructions. And this was before the bid date. After the bid date I was told that Vancouver Plywood Company had joined with Northwest Door in the purchase of that timber for Mr. Ellison and I then re-drafted the instrument to include Vancouver Plywood as a part of the parties of the first part who were going to advance the necessary funds needed by him to purchase this timber and log it. That was my purpose.

Mr. Collins: That is all, you may cross examine.

Cross Examination

Q. (By Mr. Melchior): Mr. Eisenhower, the exhibit which was handed to you, Plaintiffs' Exhibit 3, has been stipulated to be a true copy of what it purports to be according to the pretrial order. I take it then from your testimony that that is the instrument which you actually drafted?

A. I assume so from the statement that Mr. Collins made that he had compared it with the copy that I had in my office this morning.

Q. Your testimony, however, is that the instru-

(Testimony of Edgar N. Eisenhower.)

ment [28] which you drafted in the same form became the final contract? A. Yes, sir.

Q. Now I take it that you are an attorney of considerable experience, sir?

A. Well, let's say I have been at it for a long time anyway.

Q. How many years?

A. Forty-one years in the practice of law in Tacoma.

Q. And you are personally familiar in your capacity as an attorney and as an officer and director of companies such as Northwest Door with the customs and requirements of the trade of cutting timber and bringing it to the mill, is that correct?

A. I have drafted a great number of instruments, the effect of which is to get logs out of the woods into somebody's mill for consumption. They are not always the same kind, and I don't know that you could say, Mr. Melchior, that there was any kind of a custom that was adopted by everybody. I think you had to draft your instruments to fit the particular problem that each man would produce when he wanted to get out certain logs.

Q. Now this particular case prior to the time that you were requested to draft this instrument, Exhibit 3, did the responsible officers of Northwest Door confer with [29] you about the objection, the desire to achieve in this connection and the way to do it?

A. Mr. Tenzler was the only party interested in Northwest Door. He owned all the stock and what-

(Testimony of Edgar N. Eisenhower.)

ever he said was final and we always conferred with each other whenever we had a problem of financing somebody who was going to produce logs that could be used in the plant. And as I say, we used different kinds of instruments and different forms of agreements to accomplish that result.

Q. Now in this specific instance concerning Mr. Ellison and Green Forks lumber, did you and Mr. Tenzler have a discussion about the object you sought to accomplish before you sat down to draft the instrument?

A. More than one, yes, sir.

Q. And to the best of your ability did you put into the instrument the objects which you and Mr. Tenzler intended to accomplish?

A. My commitment, Mr. Melchior—let's put it this way. My commitment was to see that the company was secured in its advances. The particular way in which it was done was left up to me and I had to devise what I thought was going to be the best kind of security that I could get for my client and it happened at that time that I used this method. I used other methods. For instance, Mr. Ellison—— [30]

Q. I don't think we have to go into that, sir.

A. Okay. I thought you might be interested in other things done at the same time.

Q. Not now. What I am asking is simply this. You and Mr. Tenzler had an idea what was to be done and you had at that time a considerable accumulated experience as an attorney in drafting in-

(Testimony of Edgar N. Eisenhower.)

struments and in dealing with the type of problem presented to the company by this situation. My question, sir, is whether you then achieved to the best of your ability the task of incorporating these considerations in the instrument which you have seen, Plaintiffs' Exhibit 3?

A. I think my best answer to you is the fact that Mr. Ellison carried out his contract. Northwest Door was repaid its advances and it got the logs that Mr. Ellison promised to deliver. Beyond that I don't know what else I could have done. That is what I was supposed to do.

Q. I still don't think, with all deference, that you answered my question, although I appreciate the explanation.

A. Then I am too thick to answer.

The Court: I think you can answer the question yes or no. Read the question.

(Whereupon, the Reporter read back the question indicated.)

Mr. Collins: I will object on the ground it [31] doesn't specify what considerations——

The Court: Well actually, gentlemen, the answer is self-evident.

Mr. Melchior: Of course it is, but I ought to get it on the record.

The Court: Well in a way it is a conclusion I think that the witness is not obliged to draw unless he desires to. I take it what he means, Mr. Eisenhower, is, are you satisfied that you accomplished by this document to the best of your ability the ob-

(Testimony of Edgar N. Eisenhower.)

jectives that were assigned to you?

A. (Continuing): I think I did; I think I did. It was carried out.

Q. And you chose language which you considered to be appropriate for your objective, isn't that true?

A. Certainly, those are my words.

Q. Mr. Eisenhower, on direct examination you said that the problem arose because the company was advised that Mr. Ellison had certain lumber. Do you recall that? A. No.

The Court: Lumber?

Q. Timber. Timber. I am sorry, timber; that he wanted to buy certain timber which he wanted to log. If I said that he had certain lumber, that isn't quite an accurate statement. [32]

The Court: That isn't the way I remembered it either.

A. He wanted to acquire certain timber to log and he needed financing to help do it and he came to Northwest Door to acquire that financing.

Q. And what he wanted to do was to log it, let's be precise about that.

A. He was in the logging business and he——

Q. He wanted to log this timber, is that right?

A. Yes, and sell us the logs.

Mr. Melchior: That is all.

The Court: All right, Mr. Eisenhower, you are excused.

Mr. Collins: I have one more question.

The Court: Excuse me.

(Testimony of Edgar N. Eisenhower.)

Redirect Examination

Q. (By Mr. Collins): Mr. Eisenhower, during the exploratory talks that were had concerning the method of financing and security to be used, was any consideration given to taking a mortgage upon Mr. Ellison's equipment rather than using the device that ultimately was used?

A. I explored every possibility for security including the possibility of making a loan on any equipment [33] which Mr. Ellison had which could be mortgaged for the advance which we were willing to make. I determined there wasn't enough security to justify us taking a mortgage so I had to work some other device and this is the thing that resulted from it.

Mr. Collins: Thank you, that is all.

Mr. Melchior: One more question, if I may.

The Court: Yes.

Recross Examination

Q. (By Mr. Melchior): Mr. Eisenhower, if you can answer this just yes or no I'd appreciate it. As an attorney does the phrase "employment contract" have a meaning to you?

A. Does the phrase "employment contract" have a meaning?

Q. Yes.

Mr. Collins: Just a moment, if you please, your Honor. I believe it is asking an expert witness to testify upon the one subject that an expert can't testify on and that is what is the law before him.

The Court: I think not. I think the question may

(Testimony of Edgar N. Eisenhower.)

be answered yes or no and then if the answer is yes we will hear what it is.

A. Well, I'd say yes. [34]

The Court: Does this term have some technical meaning to you?

The Witness: Well, it has a meaning to me, yes.

The Court: All right, he says it does.

Mr. Melchior: I am not going to inquire beyond that point.

The Court: All right.

Further Redirect Examination

Q. (By Mr. Collins): I would like to know, have you elaborate on your answer and explain if you will please.

A. A strictly employment contract means that you are going to be my servant and I am going to tell you what and when you are going to do a certain job. That is what an employment contract means to me.

The Court: Seems to answer it very thoroughly.

Mr. Collins: That is all.

The Court: You may leave whenever you wish, Mr. Eisenhower.

Would you like to proceed, gentlemen?

Mr. Collins: Mr. Murphy.

(Witness excused.) [35]

EUGENE C. MURPHY

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs, and testified as follows:

(Testimony of Eugene C. Murphy.)

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Eugene C. Murphy.

Q. What is your occupation, Mr. Murphy?

A. I am the office manager at Northwest Door Company.

Q. And how long have you held that position?

A. Since the fall of 1947. I have been employed there since May of 1947.

Q. Now in your capacity as office manager, are you the custodian of the company's records?

A. I am.

Q. Do your duties also encompass supervision of the keeping of the books of account of the Northwest Door Company?

A. Yes, in charge of the accounting staff.

Mr. Collins: Please hand the witness Exhibits 6, 7, 8 and 9.

Q. Will you please examine Exhibit 6, Mr. Murphy. I don't believe it is necessary that you read any of these to the point. [36]

A. I recognize it.

Q. Is that document a portion of the records of the Northwest Door Corporation? A. It is.

Mr. Collins: Exhibit 6 is offered in evidence.

Mr. Melchior: No objection.

The Court: Exhibit 6 is admitted.

(Plaintiffs' Exhibit No. 6 admitted in evidence.) [See pages 133-134.]

(Testimony of Eugene C. Murphy.)

Q. Will you please examine Exhibit 7.

A. I recognize that also.

Q. Is that document a portion of the record of Northwest Door Company? A. It is.

Mr. Collins: Exhibit 7 is offered in evidence.

Mr. Melchior: I object to that, your Honor, on the ground that it is hearsay. The stipulation covers this exhibit only to the point that it has been agreed that this is what it purports to be, but——

The Court: I will have to have a look at it of course to see what it is.

Mr. Melchior: But with respect to its contents I think there is an objection on the merits.

The Court: Yes, that is what I am trying to do. This appears to be on the face of it an inter-office communication [37] which is denominated an inter-department correspondence from which I assume it is a memorandum from one person in the Northwest Door Company to someone else in the Northwest Door Company, the names being Mr. Tenzler to George Raknes. Is that what it is?

Mr. Collins: Yes, your Honor.

The Court: Is that what the document is, Mr. Murphy?

The Witness: Yes.

The Court: Private communication inter-office between officials of the same company. I can't see how that would become admissible or have any bearing on the case.

Mr. Collins: May I be heard?

(Testimony of Eugene C. Murphy.)

The Court: Yes, of course, certainly you can.

Mr. Collins: May I see the exhibit? The purpose of this exhibit is largely explanatory——

The Court: Well, the point we have on the matter of the admissibility is simply this: Under what circumstances would an inter-company communication from one person in the company to the other, under what circumstances would such a document become admissible in an action of Ellison against the Collector? That is the problem.

Mr. Collins: The purpose for which it is offered and then answer the question of law.

The Court: Any way you want to do it. I am not [38] a stickler for how you do it. You do it in the way it seems best for you.

Mr. Collins: Exhibit 3 shows that there was an interest in Vancouver Plywood Corporation in this transaction. Now we are going to show in order to avoid confusion, though it is not particularly important to our case one way or the other, that at a later date and before the actual harvesting of timber got under way, the Vancouver Plywood Corporation bowed out of this transaction and that is the purpose of the offer of this exhibit.

Now as to the legal question that has been posed by the defendant——

The Court: Well gentlemen, I will tell you, I think we are wasting time on a matter of this kind in a situation of this kind. This is a non-jury matter and the objection very properly is made, has been made, and if it is not proper to consider this

(Testimony of Eugene C. Murphy.)

document, I will not consider it. But in any case, it is part of the record, it is an offered exhibit. If in any respect it is either error to admit it or to deny it, that is reviewable on appeal and I think maybe we are taking time with formalities here. You may object. I will overrule the objection, admit the exhibit in evidence and we will see whether it has any bearing on our case when we get through.

Mr. Melchior: There is one problem in that [39] connection which wasn't disclosed by counsel's statement, and I am not trying to waste time——

The Court: I know you are not, of course. I am not suggesting——

Mr. Melchior: I know your Honor, but I have this problem of time in mind is all I am saying. With respect to this particular feature of the Vancouver getting out, I am willing to stipulate it and get it out of the case entirely. But there is another statement in this stipulation, Exhibit 7, which I think is purely hearsay in addition to being a conclusion of law and which would, if accepted, perhaps be prejudicial to our case, and that is the reason for my objection.

The Court: If you are willing to stipulate that Vancouver Plywood got out of the deal and approximately the time it was done, that is the only purpose for which this exhibit has been offered up to now.

All right, the exhibit will be admitted for the purpose stated and to that extent.

Mr. Collins: I'd like to offer it for one other pur-

(Testimony of Eugene C. Murphy.)

pose too, your Honor. It contains evidentiary matter. In the first paragraph, second sentence, first paragraph of proposed form of letter to Vancouver Plywood Company starting with the words, "As you know,——"

Mr. Melchior: That is what we are objecting to, [40] your Honor, that is one of the——

The Court: Yes, I don't think it adds anything to it, but I am going to admit the exhibit, Exhibit 7, over the objection made and we will give it whatever weight ultimately it seems appropriate to give it. I, of course, could make the observation that Mr. Tenzler was here as a witness and anything that he properly had to say about the matter could have been elicited from him without reference to the exhibit, but in any case, the exhibit is admitted over the objection made. Go ahead.

(Plaintiffs' Exhibit No. 7 admitted in evidence.)

[See pages 135-137.]

Mr. Collins: And just so there be no misunderstanding, it has been withdrawn, my offer of it for the limited purpose, and substituted my offer for general purposes.

The Court: It is admitted for all appropriate purposes over the objection in the manner indicated by Mr. Melchior. Go ahead.

Q. Do you have Exhibit 8, Mr. Murphy?

A. I have.

The Court: That is the lumber account with Ellison?

(Testimony of Eugene C. Murphy.)

Mr. Collins: Yes.

The Court: Any objection to that? [41]

Mr. Melchior: No objection.

The Court: Exhibit 8 is admitted.

(Plaintiffs' Exhibit No. 8 admitted in evidence.)

Mr. Collins: I will also offer 9.

Mr. Melchior: No objection.

The Court: Nine is admitted. Nine appears to be disbursement vouchers and a settlement sheet all of course of the Northwest Door Company. All right, anything else from Mr. Murphy?

(Plaintiffs' Exhibit No. 9 admitted in evidence.)

Q. Now Mr. Murphy, in your capacity as the department head, did you have anything to do with the preparation or submission of the Northwest Door Company's income tax returns for the year 1949?

A. One of the signers as chief accountant at that time.

Q. State whether or not Northwest Door Company claimed any capital gain treatment on the Green Forks transaction. On the Green Forks contract, I am sorry, on timber cut on the Green Forks contract during the year 1949.

Mr. Melchior: I object. That has no relevance to Mr. Ellison's case.

The Court: I will let the record go in to make [42] the case. Over objection it is admitted. Did it?

(Testimony of Eugene C. Murphy.)

A. Northwest Door did not take any capital gain on that piece of timber.

The Court: Gain or loss?

The Witness: Gain or loss.

Q. Do the records of the Northwest Door Company show whether or not the Vancouver Plywood Corporation owned any interest in the Green Forks contract? A. Yes, they did, or do.

Q. And in order to avoid ambiguity corresponding to those records, did or did not Vancouver Plywood Corporation own any interest at one time in the Green Forks contract? A. They did.

The Court: The Green Forks contract. You are referring of course to the contract of purchase from the United States Government, Exhibit 2; that is, the contract you are referring to?

Mr. Collins: Yes, your Honor.

The Court: There is more than one contract in evidence all referring to Green Forks, so we had better be sure which one we are talking about. All right.

Q. Do the records of the Northwest Door Company show whether or not the interest of Vancouver Plywood Corporation in the Department of Agriculture Green Forks [43] contract was ever terminated? A. It was terminated.

Q. And if you know, approximately when?

A. I don't know the exact date. It must have been in the fall of 1947 or perhaps early part of 1948.

Q. Now are you——

(Testimony of Eugene C. Murphy.)

Mr. Collins: May I have Exhibit 2, please.

Q. (Continuing): Exhibit 2 which is the Department of Agriculture contract and related documents, contains a surety bond, bond on which the Aetna Casualty and Surety Company appears as a surety. Do you know who paid the premium on that bond? If so, who?

A. It was originally paid by Northwest Door and then we deducted, voided and deducted the amount from Mr. Ellison.

Mr. Collins: May I have Exhibits 8 and 9 please. I don't need them we have copies. I am sorry.

Q. Now will you please refer to Exhibit 8, the ledger account, Mr. Murphy. Do the records of the Northwest Door Company show whether or not any money was ever loaned to Mr. Ellison?

A. There was \$50,000 advanced on March 16, 1948, and \$50,000 advanced on August 2nd of 1948.

Q. Were these sums repaid?

A. They were. [44]

Q. In what manner were these sums repaid?

A. They were deducted from remittances made to Mr. Ellison in a certain amount per thousand.

Q. Now to what account on the Northwest Door Company's ledger were these remittances made to Mr. Ellison charged? A. The \$50,000?

Q. No, the remittances made to him for logs?

A. Oh they were charged to our log purchase account.

Q. Now are you acquainted with the Revenue Agent named Gilmore? A. I met——

(Testimony of Eugene C. Murphy.)

The Court: Are you going to be with Mr. Murphy for some little time further?

Mr. Collins: Well, I don't think we will, but the——

The Court: I think we will take a short break in the day.

(Whereupon, at three-twenty-five o'clock p.m. a recess was had until three-forty-five o'clock p.m. at which time the witness resumed the stand and with all counsel being present, the following proceedings were had, to-wit:)

Mr. Collins: You may examine. [45]

Mr. Melchior: No questions.

The Court: Call another.

ROY L. AUSSERER

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Roy L. Ausserer, A-u-s-s-e-r-e-r.

Q. What is your occupation?

A. Log and lumber department manager Northwest Door.

Q. When did you start to work for the Northwest Door Company? A. November, 1941.

Q. And would you briefly tell us what your job encompasses? A. At present?

(Testimony of Roy L. Ausserer.)

Q. Yes.

A. The procurement of logs and lumber for the Northwest Door Company and to see that the various contracts and so forth toward the procurement of logs and lumber are administered in accordance with the contracts. [46]

Q. Now your duties also include the disposal of logs that are not suitable for use in the operation of your employer? A. Yes.

Q. In general what type of logs are not suitable for use in your employer's operations?

A. To answer that question, all logs are suitable for the end result. In other words, if the log is not in itself peelable at our plywood plant, the other logs could be traded for peeler for our plant, so they are all usable in a different vein, I guess.

Q. Well then, to sum it up, Mr. Ausserer, is it a correct statement, your employer in its manufacturing activities uses, that is, physically uses only such logs as can be peeled in plywood sheets?

A. That is correct.

Q. And——

The Court: The others you have you use for "swapping" to use a good old homely expression?

The Witness: Yes.

Q. (Continuing): Going back to 1947, in what capacity did you serve Northwest Door Company?

A. I was assistant to the manager of the log and lumber department.

Q. Now when and how were logs acquired by

(Testimony of Roy L. Ausserer.)

Northwest [47] Door Company during 1947, 1948 and 1949?

A. During these three years they were acquired principally by two means, open market purchases and through financing of loggers.

Q. When you say financing of loggers, what do you mean?

A. Well normally a logger would come to us and tell us about a piece of timber he'd like to buy and then we'd loan him the money to build the roads or loan him the money to buy the timber and we'd make a contract to get the logs from that piece of timber.

Q. Did the Northwest Door Company engage in logging for its own account during 1947 or 1948 or 1949? A. They did not.

Mr. Melchior: I wonder if that doesn't state a conclusion of law, your Honor? I will object.

Mr. Collins: Which question, Mr. Melchior?

The Court: Well, it probably does, but I take it what he means is that does Northwest Door directly through its own direct employees do any logging.

The Witness: They do not, your Honor.

Q. Did Northwest Door Company own any stand of timber at the time the purchase of the Green Forks timber was made, that is, any other stands?

A. Yes, they did.

Q. Now without asking you footage, can you tell [48] us whether it was a small, medium or large quantity?

(Testimony of Roy L. Ausserer.)

A. In the terms of the operation I'd say at that time it was a rather small amount.

Q. Now going back to the financing of the loggers, how were these financing arrangements handled? A. Well——

Q. I mean as a matter of practice, who did what? A. May I have that read back?

(Whereupon, the Reporter read back the question indicated.)

A. Well, in many cases it was a matter of a mere cash advance and if the logger had sufficient collateral such as logging equipment or something like that which he owned outright and on which we could take a chattel mortgage, we would take that and enter into a logging contract whereby we set forth what he was to do and what we would do. We'd get the logs or in some cases we would actually buy the timber and then advance maybe additional funds for road building or what have you, and then as the logs were taken out, we would withhold the stumpage which we had advanced as well as additional advance to cover any money advanced like falling and bucking. Does that answer your question?

Q. Up to a point.

A. There were many kinds of ways of doing it. There [49] was no one pattern as stated here earlier.

Q. Now when you put up the money you say to buy the timber for the loggers, then what were the mechanics of your—what were the mechanics of

(Testimony of Roy L. Ausserer.)

disposition of the logs, what became of the logs when they were gotten out of the woods?

A. Well they were—it was agreed upon a point of delivery which is normally dumped, rafted and scaled in the water and in most cases that was the case. And then we would buy the logs from the logger at the prevailing market price regardless of what it was, and then we would pay that sum to the logger and withhold any advances we had made for stumpage or prepaid logging costs.

Q. Now at what point during the transition of the logs from the woods to the mill were the purchases of the logs actually made, and when did you accept the logs for your company, or when did your company accept the logs? A. Well—

Q. For itself?

A. We are not speaking about any specific—

Q. No, general practice.

A. There are different terms there also, but normally the prevailing practice, as I recall at that time and still, for that matter, is that after a bunch of logs are put into the water and rafted and scaled, and upon receipt of a scale certificate, we would negotiate the [50] purchase from the logger technically in the case of a peeler rate. Oftentimes in the case of a non-peeler rate we pay him, we bought the raft from him for the same price and at the time we were able to negotiate a sale of their raft.

Q. In other words, referring to saw logs not suitable for use in your peeler plant, is it a correct statement of what you just said—

(Testimony of Roy L. Ausserer.)

Mr. Collins: I appreciate I may be leading, Mr. Melchior.

Q. (Continuing): —that at such time as you were able to find an ultimate consumer for those saw logs you then bought them from the logger, resold them to the ultimate consumer and paid the logger what you got for them less agreed deductions? A. That is correct.

Q. Now was this procedure followed by Northwest Door Company on logs that came from Green Forks timber tract? A. That is correct.

Q. Now you testified that when you bought the logs from the logger and made your remittances to him, that you made agreed deductions. Now what were those deductions, not in amount, but for what purpose?

A. Well, deductions would be for stumpage or cost [51] of the timber on the stump, any monies we had advanced for, like road building costs. We normally paid the dumping, rafting and scaling charges for reasons of bookkeeping and then we would withhold them, we would deduct from the logger at that time and then of course in the case of any raft that you buy you always are entitled to one per cent cash discount if you pay the bill within ten days, and we always did that. Normally that is what it is.

Q. During the period, during this period, 1947 through 1949 inclusive did you at any time have any logging contracts with operators who are termed in the trade "gypo"? A. Yes, we did.

(Testimony of Roy L. Ausserer.)

Q. Were these transactions similar to the Green Fork contract?

A. Some were and some weren't.

Q. Explain that please.

A. Well, we had some contracts with log contractor where we advanced the gypo who got the deal to our attention. We advanced him money to buy the timber such as in the case we are talking about. And then we withheld that advance. Then again we had other kinds of contracts where we owned the timber outright and paid him so much per thousand for bringing the logs out to us, kind of a service charge. [52]

Q. That is, you paid him a flat sum for getting the logs out of the woods and to a delivery point?

A. That is correct.

Q. Was there any one per cash discount made from that latter type of arrangement?

A. No, that is a flat fee.

Q. And did the—state whether or not the price paid the man under that latter type of arrangement remained constant regardless of market fluctuation.

A. It remained constant.

Q. Now to what——

Mr. Collins: May I have Exhibit 9 please? Hand Exhibit 9 to the witness please.

Q. (Continuing) Now you are examining Exhibit 9, Mr. Ausserer. Do you know what that is?

A. Yes, sir. I prepared it.

Q. Are these particular documents a fair representation of the general manner in which settle-

(Testimony of Roy L. Ausserer.)

ments were made with Mr. Ellison on the Green Forks timber? A. Yes, they are.

Q. Now would you please turn to the second sheet of the exhibit, down at the bottom of the page appears the item "charge account 1009." What is account 1009?

A. All logs which we purchase for—all logs which we purchase are charged to log purchase account 1009. [53]

Q. Now will you please examine a little bit above that item on the same page. There is an item "stumpage" and then an itemization by varieties.

A. Yes.

Q. What does that include?

A. That is the rate at which we deducted a fixed sum for those feet according to specie to reimburse us, to get back the money we had advanced for the purchase of the timber.

Q. Was there any deduction made for slash disposal guaranty?

A. I don't know whether it was included in those figures or not.

Q. Now returning to these other types of contracts where the man received a stipulated sum per thousand for getting out the logs regardless of market fluctuation, to what account were disbursements made to those people charged?

A. They have a separate account. I believe it is a—I am not positive. It is 175 dash something or other series.

Q. And——

A. Logging contract series.

(Testimony of Roy L. Ausserer.)

Q. Is that the title of the account, logging contract?

A. Well, it is a—contractor is the title of it, contractor. Whether that is the exact title I don't know. [54]

Mr. Collins: I believe that is all.

The Court: Cross?

Mr. Melchior: No questions.

The Court: And you also may leave whenever you wish. Call another please.

(Witness excused.)

Mr. Collins: Mr. Wall. [55]

THEODORE FRANKLIN WALL

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Theodore Franklin, W-a-l-l.

Q. Mr. Wall, where do you live?

A. Woodland, Washington.

Q. And what is your age?

A. Seventy years.

Q. Now were you living in Woodland, Washington in 1947? A. Yes, sir.

Q. And what at time was your occupation?

A. In 1947 I was managing the operation that

(Testimony of Theodore Franklin Wall.)

I sold to the Northwest Door, now known as the Wall Boom.

Mr. Collins: I think I can speed this up, your Honor, if I may lead the witness briefly.

The Court: Yes, go ahead.

Q. Was the Wall Boom a distribution and storage point where various persons in the logging industry brought their logs and made arrangements to get them in shape for further movement? [56]

A. Yes, sir.

The Court: Might tell you that Wall's Boom is very well known to me. I have had lots of cases involving Wall's Boom at one time or another and I am glad to meet the fellow whose name is attached to the boom.

Q. Approximately when were you first employed by Northwest Door Company?

A. When was I?

Q. Yes. A. In January, 1947.

Q. In what capacity did you serve?

A. I stayed on there for the year 1947 managing the operation that we built up and sold to the Northwest Door.

Q. That is the Wall Boom?

A. Yes, now known as the Wall Boom, yes, sir.

Q. Now during that time and in prior years even did you engage in buying logs for Northwest Door Company? A. Yes, sir.

Q. What type of logs did you buy for them?

A. Well, I don't remember them getting anything but peeler logs from our boom there. We per-

(Testimony of Theodore Franklin Wall.)

haps sold them sawmill logs, but I'd say ninety-nine per cent were peeler logs.

Q. Are you acquainted with Mr. Ellison? [57]

A. Yes, sir.

Q. And when did you become acquainted with him?

A. Oh, I'd say along back in the early thirties.

Q. Now, are you familiar with a stand of timber know as Green Forks tract? A. Yes, sir.

Q. Now did you ever, after you had—or did you ever receive any instructions from the Northwest Door Company to look for timber that could be acquired? A. Yes, sir.

Q. Did Northwest Door Company conduct any logging operations of their own in that area? By "that area" I mean the Green Forks area around Woodland?

A. As far as I know there was never any logs come to our boom there.

Q. Were you—in 1947 were you aware of the practice that has been testified to of Northwest Door to finance loggers? A. Yes, sir.

Q. How was this accomplished?

A. How is that?

Q. How did they do it?

A. How did they inform me of it, you mean?

Q. What? A. How did I know? [58]

Q. No, no. You are a little hard of hearing, Mr. Wall? A. Yes, I am.

Mr. Collins: May I approach the witness?

The Court: Yes, but it is best to speak louder

(Testimony of Theodore Franklin Wall.)

because when you approach a witness who doesn't hear well they quite often drop their voice. We often have it happen here.

Mr. Melchior: I wonder if that problem isn't cumulative, your Honor? We could save time by going on.

The Court: Yes, it seems to me it has been pretty fully covered. It doesn't add anything for Mr. Wall to tell us about it again. Go ahead.

Q. When did you first become aware of the availability of the Green Fork timber?

A. In 1946.

Q. Approximately what time of the year?

A. It was in the fall of 1946.

Q. Did you ever discuss the Green Fork timber with Ellison?

A. Yes, sir.

Q. When?

A. Well, I think I discussed that with him shortly after the first trip I was up there and looked it over.

Q. And when was that? [59]

A. That was in the fall of 1946.

Q. Now, what was the nature of your discussion with Mr. Ellison about the Green Fork timber?

A. Well, Mr. Ellison was looking for a logging operation and I was instructed by the Northwest Door to look up different tracts of timber and that was one of the first ones I looked over and, well, that is one of the first tracts we looked over.

Q. Did you go through this timber with Mr. Ellison?

(Testimony of Theodore Franklin Wall.)

A. Yes, sir, but not until, oh, I think that was in 1947.

Q. About what time in 1947?

A. Well, the way I remember it, it was along the latter part of 1947 if I remember right. We were there a couple of different times. I remember that. We might have been there before, in the fall too.

Q. Did Northwest Door Company have any interest in the timber at the time you and Mr. Ellison first looked it over?

A. None whatever.

Q. Now, what was the purpose of the two of you going up there to look it over?

A. Well, there was a lot of expense involved in opening up this tract of timber. We went up to see whether we wanted, whether we could figure out a way it could be [60] taken out profitably. That was really the first trip we made up there.

Q. Did you and Mr. Ellison ever discuss Ellison's acquiring that timber and logging it?

A. Yes, sir, but the operation was too big. He had to have someone to finance it.

Q. Now you have testified that you went up there to investigate ways and means of getting it out, see whether it could be extracted profitably. Now, did you ever take any engineer up there to check on the road situation?

A. Yes, sir.

Q. Who was it if you recall?

A. I got Peter Kiewit. They were operating extensively along around Longview and Woodland at

(Testimony of Theodore Franklin Wall.)

that time. They had a very good engineer and I got him to go up there and check our figures.

Q. Is that the firm Peter Kiewit and Sons, the highway contractors? A. Yes, sir.

Q. And state whether or not Mr. Ellison previously had laid out road lines up there.

A. Yes, sir.

Q. And did you have this engineer check them over to see whether or not Mr. Ellison had made any bad mistakes?

A. That is right, that was the purpose of that trip. [61]

Q. Now, did you discuss with any officer of Northwest Door Company the amount that Ellison would require to log that timber? A. Yes, sir.

Q. Approximately what amount was discussed?

A. Well, we were figuring around seventy-five to a hundred thousand dollars.

Q. Did you and Mr. Ellison ever estimate the maximum cost for which that timber could be acquired from the Forest Service and still permitted to be gotten out at a profit? A. Yes, sir.

Q. Now was that information that you and Mr. Ellison worked up furnished to Northwest Door Company? A. Yes, sir.

Q. Was that done prior to the time the Forest Service held the Green Forks Timber sale?

A. Yes, sir.

Q. Now did Mr. Ellison discuss with you the maximum amount that he would be willing to pay for the stumpage? A. Yes, sir.

(Testimony of Theodore Franklin Wall.)

Q. And did you transmit that information on to the Northwest Door Company? A. Yes, sir.

Mr. Collins: You may cross examine. [62]

Cross Examination

Q. (By Mr. Melchior): When did you first go over this Green Forks stand of timber, Mr. Wall?

A. For some reason there is an echo in here. I don't hear very well.

The Court: Other people have that trouble from time to time, Mr. Wall. Come to the podium counsel.

Q. When did you first go over this Green Forks timber stand with Mr. Ellison?

A. Well that was in 1946.

Q. At that time do you know who owned that timber? A. Oh yes, Forest Service timber.

Q. Was that land and timber on it advertised for sale, just the timber on it at that time?

A. No. Let me go back a little bit further. The Forest Service had made a sale right at the mouth of Green Fork to a man by the name of Brown who defaulted on his contract and the Forest Service wanted me to go up there and look that over and complete it. That is while I was investigating that they told me to look over the Green Fork area because they were going to have a sale up there the next year.

Q. The Forest Service told you to look it over?

A. That is right. [63]

Q. So for whom were you working when you looked that land over?

(Testimony of Theodore Franklin Wall.)

A. The first time I was up there I was working for Wall Brothers, for myself. That is prior to my sale to Northwest Door.

Q. That was in 1946? A. Yes, sir.

Q. Did you talk about your inspection with anybody?

A. As soon as I sold out to the Northwest Door why that was going to be part of my duties in 1947 was to acquire timber and that was one of the first projects that I put up to.

Q. That is you put up the Green Forks to Northwest Door for the purpose of their getting timber out of it? A. That is right.

Q. And who was Ellison? Did he live in that area? A. Yes, sir.

Q. What was his business, do you know?

A. Logging.

Mr. Melchior: Your witness.

The Court: In all these matters, Mr. Wall, in all these matters after January of 1947 when you sold out to Northwest, you were acting from then on for the Door Company, were you?

The Witness: Yes, sir, in the year of 1947. [64]

The Court: Whatever interest you took in it then you took it on account of what you understood to be your job with the Door Company, is that right?

The Witness: That is right.

The Court: Yes, all right. That is all, Mr. Wall, and you may leave whenever you wish now.

Mr. Collins: One more question.

(Testimony of Theodore Franklin Wall.)

The Court: Excuse me. This gentleman has one more question.

Redirect Examination

Q. (By Mr. Collins): Mr. Wall, Mr. Melchior asked you what Mr. Ellison's occupation was and you said logger. Now do you know whether or not Mr. Ellison also sold logs?

A. That is right. A logger sells nine times out of ten sells his logs, his own logs.

Q. Will you please explain what you mean by "logger." What is a logger?

A. A logger is a man who goes out into the woods and acquires the timber and he builds his road and if he has got an engineering problem he solves the whole thing, puts the logs into the market. That is what I term a logger.

Mr. Collins: That is all.

The Court: In other words, Mr. Wall, [65] whatever kind of a deal he has got to do, they may vary from every kind of a deal there is, isn't that right?

The Witness: Each operation is a separate engineering field in itself.

The Court: We understand that in this part of the country. There are about as many different kinds of deals for logging as there are deals, isn't that right?

The Witness: That is right.

The Court: And the logger is the fellow who in one manner or another, on one kind of a deal or another, brings the logs out?

(Testimony of Theodore Franklin Wall.)

The Witness: That is right.

The Court: Okay, that is all, Mr. Wall. You may leave any time you want now.

(Witness excused.)

Mr. Collins: Call Mr. Reinsch. [66]

H. G. REINSCH

being first duly sworn on oath, was called as a witness on behalf of the Plaintiffs and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: H. G. Reinsch, R-e-i-n-s-c-h.

The Court: Excuse me, how do you spell it?

The Witness: R-e-i-n-s-c-h.

Q. In 1947, Mr. Reinsch, what was your occupation?

A. I didn't work in 1947 until in the fall, about late in July I think I started working, and I had been sick and I couldn't work.

Q. And prior to the time you got sick what was your job?

A. I had been with Northwest Door Company since almost when they started and——

Q. In what capacity?

A. I always was in the purchasing department of raw material.

Q. Now were you in charge of log procurement?

A. Yes, sir.

(Testimony of H. G. Reinsch.)

Q. And did you have the job then that Mr. Ausserer now has? [67]

A. Yes, except I handled the timber end which he has charge of now.

The Court: Let's see if I understand that, Mr. Reinsch. You mean you had charge of the actual logging operations as well as the locating of it and so on?

The Witness: I supervised it all.

The Court: You supervised the whole thing at that time?

The Witness: Yes.

The Court: I see.

Q. Now, when did the Northwest Door Company first start logging operations on its own account?

A. 1949.

Q. Now, were you familiar with the financing arrangement that has been testified to whereby the Northwest Door Company bought timber for loggers and turned it over to them and then bought the logs back?

A. Yes, sir.

Mr. Melchior: I can't accept all of counsel's statement.

The Court: I understand that the question was leading and implies elements that are in controversy, but what you mean is that you are familiar with what has been described here as practices before, is that what you mean?

The Witness: That is right. [68]

The Court: All right, go ahead.

Q. Now when you returned to work in 1947, at

(Testimony of H. G. Reinsch.)

that time from what source did the Northwest Door Company primarily obtain its supply of logs?

A. The open market.

Q. Now, those logs that you purchased in the open market primarily were what type of log?

A. Peeler logs.

Q. Now are you familiar with the Green Fork timber in a general way? A. Yes, sir.

Q. Now are you aware that the company advanced money to Mr. Ellison in connection with this Green Fork job? A. Yes, sir.

Q. Do you know for what purpose the advances were made? A. Yes, sir.

Q. And what were those purposes?

A. Road building, sometimes maybe he was short and needed a little advances to meet bills and sometimes maybe for buying a piece of equipment, to buy a security bond, various reasons why he needed money.

Q. Now at this general time, and I am referring to the latter part of 1947, did you have any other loggers being [69] financed under this same type of arrangement that was used with Mr. Ellison?

A. No, sir.

Q. Now, did you exercise any supervision over the manner in which Mr. Ellison performed his logging operations in the woods?

A. Yes, sir, I paid frequent trips up there to discuss various problems as they came up, utilization and financing as well. Not from the standpoint of running the operation, but from the stand-

(Testimony of H. G. Reinsch.)

point of assisting Mr. Ellison and getting the most efficiency out of it and the most money out of it by giving us what we could pay the most for.

Q. Now at what point were these logs from the Green Fork tract delivered to the Northwest Door Company?

A. At three points. We had a reload at a place named Lucia Railroad up in the road and Wall Boom another place of delivery and also hauled logs directly into Olympia, Washington.

Q. Now state whether or not there was any agreement with Mr. Ellison for the absorption of any loss to logs that might occur before they were delivered into the custody of Northwest Door Company.

A. Well, any loss that took place was too bad for Mr. Ellison. [70]

Q. What do you mean by that, Mr. Reinsch?

A. He would be the loser.

The Court: You mean you were only going to pay him for the logs he got to the dump?

The Witness: Logs delivered to our points.

The Court: To your delivery points?

The Witness: Yes.

Q. Now during the time that Mr. Ellison was carrying on his logging operations in this area, were there any Forest Service personnel present?

A. Yes, sir, at times.

Q. And state whether or not there were any occasions when it became necessary for dealings to

(Testimony of H. G. Reinsch.)

be had in connection with the job with the representatives of the Forest Service? A. Yes, sir.

Q. Now, when such occasion arose, who was it dealt with the Forest Service directly, you or Mr. Ellison or somebody else?

A. If you mean whom did it affect financially, it was Mr. Ellison.

The Court: No, no. He meant who individually would talk with these Forest Service fellows from time to time?

A. (Continuing) Well, occasionally it might have [71] been a general discussion, but usually it was the logging operation that Mr. Ellison performed and Mr. Ellison would be the one that would be questioned.

Mr. Melchior: I didn't hear that.

The Court: Ellison.

Mr. Melchior: Thank you.

The Court: Usually, he said, usually Ellison since he was the fellow who was doing the work he'd be the one who would be talking to him.

Q. Now during the course——

The Court: That is what you meant, wasn't it, Mr. Reinsch?

The Witness: Yes.

Q. During the course of this operation was there any dealing with the Forest Service regarding locating or relocating any of these logging roads?

A. Yes, occasionally.

Q. And who was it that negotiated this particular matter with the Forest Service people?

(Testimony of H. G. Reinsch.)

A. Mr. Ellison.

Mr. Collins: You may cross examine.

Cross Examination

Q. (By Mr. Melchior): Actually when there was negotiation with the [72] Forest Service about the terms of the contract and its execution quite frequently there is correspondence on the part of Northwest Door Company directly to the Forest Service, isn't that so?

A. Well, that depends. If it is a practical matter, if it were out in the woods it would be taken up in the woods. On the other hand, if it was correspondence we probably would do it, with a copy of the letter to him if it concerned both of us because we wanted to be informed of everything that was going on because in the end we had the responsibility there to that extent.

Q. If it was a practical matter out in the woods it would be taken up right on the spot?

A. Yes, sir.

Q. But when you got into problems of computing prices and things like that, it was done in your office with the Service?

A. Well, if Mr. Ellison hadn't figured he was able to figure that timber profitably we would have been out of it.

The Court: That isn't the question. Did you from time to time correspond with the Forest Service concerning the amount that you owed the For-

(Testimony of H. G. Reinsch.)

est Service and the contract and so forth, matters pertaining to the execution of the contract? [73]

A. (Continuing) To the financial, yes, sir, sure.

Q. As a matter of fact the state has certain requirements about cleanup after the cut and all that. Did you undertake some negotiations with them?

A. That was all settled before we even started logging.

Q. Who settled that?

A. The contract provides for all the things that could be foreseen.

Q. Well, who made all the provisions, what party? A. For what was to be done?

Q. What person arranged for this cleanup matter and all of these preliminaries, things to anticipate, what could be foreseen?

A. The Forest Service.

Q. And who else on the other end?

A. Ellison.

Q. Not Northwest Door? A. No, sir.

Q. You mean that——

Mr. Melchior: May I have Exhibit 2, please.

Q. (Continuing) You mean before the contract was entered between the Forest Service and the private parties who were to take out this timber Ellison went to the Forest Service and discussed such things as maintenance of [74] truck roads or use of truck roads by other purchasers, fire lines, spark arrestors, tail tree equipment and things like that?

(Testimony of H. G. Reinsch.)

Mr. Collins: Just a minute please. I object to the question, your Honor, as assuming a fact not in evidence.

The Court: Well of course if there is—if that is the case Mr. Reinsch was in charge of this matter at that time and he should know about it.

Mr. Collins: Here is my point, your Honor. Mr. Reinsch was questioned about what happened after the Ellison job started on direct examination.

The Court: Well, we might have gotten into the difficulty by my intervening in the matter and now that it has been brought up I think we had better get it settled.

Mr. Collins: My objection is it is getting outside of the scope of direct.

The Court: Let's get it settled and I'd like to do it quickly so we can suspend for tonight.

Q. (Continuing) Do you remember the question?

A. You covered a lot of territory there, what the contract specified and in some cases it might not mean anything because when they approach the problem it has to be worked up on the ground by somebody and that somebody would be Ellison. [75]

Q. And you mean Northwest Door had nothing to do with any of the provisions that were in this contract?

A. We made the contract with the Forest Service with the intention of him fulfilling the thing profitably and me getting the logs, yes.

The Court: But the point is, Northwest Door

(Testimony of H. G. Reinsch.)

made the commitment to the Forest Service in the first instance?

The Witness: That is right.

The Court: And some parts of those responsibilities would be undertaken by Mr. Ellison because he was on the ground?

The Witness: Yes.

The Court: Others of them would be the responsibility of the Door Company having a contract to attend to it?

The Witness: Financially responsible, yes.

Q. You people could be held liable by the Department of Agriculture on this contract?

Mr. Collins: Objected to as calling for a conclusion of law.

The Court: Yes, it is a conclusion of a non-expert witness.

Mr. Melchior: All right.

The Court: Anything else?

Mr. Melchior: Yes, just a couple of questions.

The Clerk: Defendant's Exhibit A marked for identification.

(Defendant's Exhibit A marked for identification.)

Mr. Collins: Do I understand counsel is about to offer exhibits that were not listed in the pretrial order?

The Court: Yes, go ahead.

Mr. Collins: I will object.

The Court: We have got to see what they are because if they could have been anticipated and

(Testimony of H. G. Reinsch.)

something of that kind, why of course I will not admit them. On the other hand, if they arrived by virtue of something happening during the trial, I will consider them. Go ahead.

Q. You have Defendant's Exhibit A in front of you, Mr. Reinsch. Do you recognize the signature on the three letters which have been marked as that exhibit? A. The exhibit number?

Q. The signatures that appear on each of those sheets. A. Yes.

Q. Have you seen that signature before?

A. Yes, sir.

Q. Whose signature is it?

A. Mr. Ausserer's. [77]

Q. Is that the stationery of the Northwest Door Company? A. It is.

Q. On each of those sheets? A. Yes.

The Court: We are going to have to suspend over until tomorrow. I am anxious to conclude. We have been running long hours and under unusual circumstances lately.

Mr. Melchior: I am about through.

Q. You testified that certain correspondence with respect to the Agriculture Department on this contract was handled from your office. Let me ask you whether Defendant's Exhibit A for identification, three letters in front of you, are typical of such correspondence? A. Well——

Mr. Collins: Just a moment, if your Honor please, I will object to that question on two grounds. The matter obviously is an impeaching question.

(Testimony of H. G. Reinsch.)

The person who signed the exhibits has testified and no attempt has been made to impeach him with them. The witness did not sign the exhibits himself and they haven't been displayed to counsel.

The Court: We are in the process of identifying them. They have not been offered yet. They are in the process of identification. Go ahead. Do you recognize these letters? [78]

The Witness: Yes, sir.

The Court: Go ahead.

Q. Are they letters of the type you were referring to as the type of correspondence your company had with the Agriculture Department?

A. Well, when you asked the question before I believe you were referring to the operation of the logging.

Q. No, I just asked you this question right now. That is the only one I want you to answer.

A. That is correspondence that is routine correspondence. I might not even have known anything about that.

Q. The only thing I am asking you is whether this is routine correspondence of the type your company carried on with the Forest Service under this contract?

A. Yes, the first letter refers to scaling differentials.

Mr. Melchior: I now offer Exhibit A.

The Court: Anything further from Mr. Reinsch?

Mr. Melchior: No.

Mr. Collins: There may be, your Honor.

(Testimony of H. G. Reinsch.)

The Court: I am talking about counsel.

Mr. Collins: May I ask one question?

The Court: Certainly. [79]

Mr. Collins: Mr. Reinsch, when did you cease to be the manager of the log and lumber division?

The Witness: I retired January, 1952.

Mr. Collins: Your Honor, Exhibit A is objected to on the following grounds: First, it is irrelevant and immaterial in that the only purpose for which this correspondence could be offered, if it readily appear from examination of it, is that the legal conclusion as to Mr. Ellison's status made by the person who sent the letter. And secondly, that as examination of the witness will readily disclose, it does not cover anything that could not be anticipated and should have been marked and attached to the pretrial.

The Court: I will consider the matter in the morning. Anything further from Mr. Reinsch?

Mr. Melchior: No further cross examination.

Mr. Collins: On redirect we have a few brief questions.

The Court: All right.

Redirect Examination

Q. (By Mr. Collins): Mr. Reinsch, during the performance of the Forest Service contract was there any substitution made by agreement between the Forest Service people and Mr. Ellison [80] of one tract to be logged instead of one that had been specified in the contract?

Mr. Melchior: Just a moment. May I have that read?

(Testimony of H. G. Reinsch.)

The Court: Was there a substitution of one tract to be logged instead of one described in the contract. Is that it?

Mr. Melchior: Between whom, however? He said by agreement between.

Mr. Collins: I will take it in two questions.

Q. (Continuing) First, Mr. Reinsch——

The Court: I think it is going to take too long, gentlemen. I can't impose on these people. We will have to bring them back in the morning.

(Whereupon, at four-forty-five o'clock p.m., March 15, 1956, a recess was had until ten-five o'clock a.m., March 16, 1956, at which time witness Reinsch resumed the stand for continued redirect examination by Mr. Collins, and counsel being present, the following proceedings were had, to-wit:)

The Court: I reserved ruling on the admission of this exhibit and you said that you had some additional question or two on redirect and then it got too long and I cut you off. All right, go ahead.

Mr. Collins: Regarding this Exhibit A, your Honor, we offer to stipulate that each side waive the objection that the exhibit is not listed in the pretrial order.

The Court: I am not concerned about that. I am going to admit the exhibit over your objection as before in the case of exhibits submitted on the other side. The whole matter will be before the Court and we will consider what, if any, effect to give to it later. All right, go ahead.

(Testimony of H. G. Reinsch.)

Q. Referring to the Green Fork job during the course of this operation was there an arrangement made with the Forest Service to substitute for cutting a portion or a tract of timber that was not included in the Forest Service contract in the place of the tract of timber that was included in the Forest Service contract? Do you understand what I mean? A. A swap you mean?

Q. Yes. A. Yes, sir.

Q. Now by whom was that arrangement made with the Forest Service? A. Ellison did that.

Q. During the time that the Green Forks operation was in progress did Mr. Ellison furnish logs to Northwest [82] Door Company that came from any other source? A. Yes, sir.

Q. What was that source?

A. Ellison took some salvage sales on and some small cleanup sales on his own with which Northwest Door had no connections excepting we got the logs.

Q. Was the purchase of these logs from what we refer to as other sources, handled in the same way as the logs that came from the Green Forks tract were treated?

Mr. Melchior: I see no reason for going into that, your Honor. I object.

The Court: I will let the record be made. Overruled.

A. These logs were included with all the other logs and handled in the same manner through our

(Testimony of H. G. Reinsch.)

office as far as keeping accounts of scale records and so on.

Mr. Collins: You may cross examine.

The Court: Anything further?

Mr. Melchior: Nothing further.

The Court: You are excused now, Mr. Reinsch. I am sorry we had to bring you back for so brief a matter.

Call another.

(Witness excused.)

Mr. Collins: In view of the introduction of Exhibit A may I recall Mr. Ausserer? [83]

ROY L. AUSSERER

having been previously sworn on oath, was recalled as a witness on behalf of the Plaintiffs and testified as follows:

Further Direct Examination

Mr. Collins: May I have Exhibit A please. Will you please hand Exhibit A to Mr. Ausserer.

Q. Mr. Ausserer, do those documents that are Exhibit A bear your signature?

A. Yes, they do.

Q. Now during the period of time through which they are dated, that is, June through December, 1951, were you a policy-making officer or employee of Northwest Door Company?

A. I was not.

Q. Now for what purpose were these letters written by you?

A. Well, the one of June 15th and the one of

(Testimony of Roy L. Ausserer.)

December 11th, wait—the one of June 15th was written merely as a—bring our records of stumpage cut into accordance with the Forest Service records because the bookkeeping and keeping track of scale certificates and the footages on the scale certificates, was handled by the Northwest Door office because we had the personnel to do it there and we kept them in accord with the Forest Service records.

Q. Referring to the other letter, what purpose was it written for?

A. Well, since the name of the Northwest Door Company was on the bond furnished the Forest Service, naturally when the terms of the contract with the Forest Service had been fulfilled, we wanted to get us released.

Mr. Collins: May I see that exhibit please.

Q. Now in the letter dated October 18, 1951, which is the letter asking for the release of the bond you refer to Mr. Ellison as “contract logger” for the Northwest Door Company. Would you explain why you referred to him in that term and what you meant by it, if anything?

A. Well, actually nothing in particular was meant by it. It is a term by which we refer to practically anybody who logs from whom we buy logs or logs for us. They are either gypo or contract logger. It is generally a term of the industry. I might add that we usually used the word “gypo” to any small operator who brings in a load or two in due respect to a big logger who we call contract.

(Testimony of Roy L. Ausserer.)

The Court: Is that the distinction of gypo and contract?

The Witness: That is the way I always used it. I never liked the word "gypo" as well as the other one.

Mr. Collins: You may cross examine.

The Court: Anything further from this gentleman? [85]

Mr. Melchior: No, your Honor.

The Court: That is all, Mr. Ausserer. You may leave whenever you wish. Call another please.

(Witness excused.)

ROBERT F. ELLISON

being first duly sworn on oath, was called as a witness on his own behalf and testified as follows:

Direct Examination

By Mr. Collins:

The Clerk: State your full name and spell your last name.

The Witness: Robert F. Ellison, E-l-l-i-s-o-n.

Q. Where do you live, Mr. Ellison?

A. Woodland, Washington.

Q. And what is your occupation?

A. Well, I am a logger.

Q. And how long have you engaged in that pursuit?

A. Approximately twelve years.

Q. During that period have you been in the employ of anyone or have you been in business on your own account?

(Testimony of Robert F. Ellison.)

Mr. Melchior: I think that calls for a legal conclusion. I will object.

The Court: Well, go ahead.

Mr. Melchior: Just for the record. [86]

The Court: All right, but let him in narrative form get on with these matters as rapidly as we can. Go ahead.

A. I have been managing my own business during that period.

Q. Now in a general way what do you do in that business?

A. Well, it is a business of either acquiring timber and going through the process of removing the timber from the woods to a market, or point of market, and selling logs.

Q. Do you do any logging for other persons of timber owned by them? A. Yes.

Q. Now have you heard the term "contract logging"? A. Yes, I have.

Q. And what does that term mean to you?

A. Well, contract logging as I would understand it would be where you agree to remove the logs from the woods of someone else's logs for a certain price, we will say so many dollars. You fall them and buck them and load them on the trucks and haul them into a specified point for a fixed fee of so many dollars per thousand.

Q. Now when did the Green Fork timber stand first come to your attention?

A. I believe that I first heard about it the latter part of 1946 or early 1947.

(Testimony of Robert F. Ellison.)

Q. And from what source? [87]

A. Mr. Wall.

Q. Now did you at any time ever go up there and examine that area and look over the timber?

A. Yes, I did.

Q. And did you do so on more than one occasion? A. Yes.

Q. When was the first time you went up?

A. First time was in the early part of, or fairly early part of 1947. I went up with Mr. Wall the first time. He showed me.

Q. For what purpose did you and Mr. Wall go there?

A. Well, primarily the purpose of course was to look at this timber and project to see if it was feasible to buy the timber and complete the job and do it economically.

Q. What, if any, interest did you personally have in determining whether or not that could be done?

A. Well, I was interested in acquiring this timber in one manner or another. Naturally I wanted to look at it and be sure in my own mind that it was a good proposition.

Q. When was the second time you went up there?

A. Well, I think that it was very shortly within a few days after the first time. In between the times I had considerable discussion with Mr. Wall about how we could purchase this timber or how

(Testimony of Robert F. Ellison.)

I could, and I went back on my own to—that is, to look at it some more. [88]

Q. Now did you tentatively lay out a road system for access to that timber?

A. Yes. The work on the road system was actual detail work plan of profile that I did and was somewhat a little later I think in the summer of 1947.

Q. Was that prior to the time that timber was put up for sale in your, August or September of 1947?

A. Yes, yes it was.

Q. Now, did you make any determination as to what price could be paid for stumpage and still be permitted to be extracted as profit?

A. Yes, I had to do considerable work and figuring on that.

Q. Now was this information both as to the feasibility of getting the timber out, tentative road system you laid out and your conclusion as to the price that could be paid for timber communicated to the Northwest Door Company?

A. I communicated through their representative.

Q. Who was their representative?

A. Mr. Wall.

Q. Now thereafter was that timber sold by the Forest Service?

A. Yes, it was.

Q. Who bought that timber?

A. Well, Northwest Door and I bought it. [89]

Q. Will you explain why the transaction was handled in the name of Northwest Door Company?

A. Well, from the time I first looked at it I did

(Testimony of Robert F. Ellison.)

considerable figuring on how to finance it which I didn't think that I could. So in a discussion with Mr. Wall, why we talked about the possibility of Northwest Door financing it and that plan was decided on that that would be a very satisfactory way to get it.

Q. Now thereafter according to testimony you proceeded to extract that timber. Now when did you first begin to get timber out of that area?

A. I believe that we didn't remove any logs until approximately September of 1948.

Q. And will you explain why this approximately one year's delay?

A. Well, this job required seven and some fraction miles of road building improvement plus minimum of two or three more miles of new construction road that had to be all completed before you could remove any logs. And of course part of that time was during this winter condition where you couldn't build roads, so it delayed us for practically at least eight or nine months.

Q. Was this road network that was put in, was that the road network the Forest Service had laid out or not?

A. Well, they had their own first. We will say [90] they had their specifications for the type of road that had to be built there.

Q. To save time, Mr. Ellison, I am referring to the course of the road.

A. They did have a plan of the profile.

Q. Was their plan followed or was another one used?

(Testimony of Robert F. Ellison.)

A. Their plan was followed in part and another one was used in part.

Q. Now this deviation from their profile, by whom was that laid out? A. I laid that out.

Q. And was that the road plan that you had tentatively laid out when you were working up the data for a bid? A. Yes, it was.

Q. Now was this plan later approved by the Forest Service?

A. Yes, it was approved and they were—I might add they were very happy.

Q. Did Northwest Door approve this change or know anything about it?

A. Well, to my knowledge they didn't know anything about it, that is, until after the changes were under way or the work was being done they might have.

Q. Was a representative of Northwest Door Company present at any discussion with the [91] Forest Service people regarding this proposed change? A. No.

Q. Who was the individual that consummated the arrangement with the Forest Service? I don't mean their representative, I mean the other party?

A. Will you repeat that again? I didn't—

Q. What individual was it that negotiated this change with the Forest Service people?

A. Oh, well that was myself.

Q. Now after the Forest Service contract had been let you have testified that you started putting in roads. Now did you borrow any money to use

(Testimony of Robert F. Ellison.)

for that purpose? A. Yes, I did.

Q. How much?

A. Well, I borrowed a total from or I borrowed a total of a hundred thousand dollars in 1948.

Q. And from what source?

A. Northwest Door Company.

Q. Now did you put any additional money into this matter? A. Yes.

Q. How much?

A. In 1948 I remember approximately I believe around at least \$175,000 into that job during 1948.

Q. Did that figure, that \$175,000 include the [92] money you borrowed from Northwest Door?

A. That was a part of it.

Q. And what was the source of the other \$75,000?

A. Well, it was monies that I had of my own or other resources that I was able to raise money.

Q. Now, Mr. Ellison, you were present in court, heard Mr. Reinsch's testimony? A. Yes.

Q. Do you recall Mr. Reinsch testified there had been an exchange, a swap, of the tract of timber by the Forest Service not included in that Department of Agriculture contract to replace a tract of timber that was included in the Forest Service contract, do you remember that transaction? A. Yes, I do.

Q. Now prior to the time that that exchange was made did you get the permission of Northwest Door Company?

A. No, I didn't talk to them prior to—I think

(Testimony of Robert F. Ellison.)

I follow you on the question. Maybe you had better repeat it.

The Court: Well, he just wanted to know what, if any, contract you had with Northwest Door about this swap. That is what he means.

Q. Before it was made.

A. No, I didn't have any. [93]

Mr. Collins: May I have Exhibit 1 please.

Q. Mr. Ellison you have been handed Exhibit 1. It has been stipulated this is your income tax return for 1949. Now is the data that is contained in Exhibit 1, is that taken from your books and records? A. Yes.

Q. And were these books and records kept by you in the regular course of your business?

A. Yes.

Q. And do these books and records, and incidentally Exhibit 1, reflect this Green Forks timber transaction? A. Well they certainly would.

The Court: I think that is all agreed, isn't it? Any problem about this? Can't we get on with this a little faster?

Mr. Melchior: Yes, I think all of these formal exhibits——

The Court: Let's get on with it. Exhibit 1 is offered and there is no objection it is admitted in evidence.

(Plaintiff's Exhibit No. 1 admitted in evidence.)

The Court (Continuing): All right. How about the claim for refund 4 and the statutory notice of

(Testimony of Robert F. Ellison.)

deficiency 5? Can those be admitted in the same manner? [94]

Mr. Melchior: No objection to those or to 10 or 11.

The Court: All right, 4, 5, 10 and 11. Do you wish to offer each of those, Mr. Collins?

Mr. Collins: We will offer 4 and 5, your Honor, but——

The Court: All right, 4 and 5 are admitted. What about 10 and 11?

(Plaintiffs' Exhibits Nos. 4 and 5 admitted in evidence.)

Mr. Collins: I don't think we are going to need them, your Honor.

The Court: All right, they are not offered so they are not for now admitted. Go ahead.

Q. Now referring to timber that came from the Green Forks tract during the time that you got it out of the woods and brought it into the delivery point, did you treat that timber as your own?

A. Well, I certainly felt as though it was my own.

The Court: The answer is not responsive and it is stricken.

Q. Answer that question yes or no. A. Yes.

Q. Now did you pay any transportation tax on that timber?

A. On the trucking of it you mean? [95]

Q. Yes. A. No.

Q. Did you claim capital gain treatment on the timber? A. Yes.

(Testimony of Robert F. Ellison.)

Mr. Melchior: I think that is taken care of in the pretrial.

The Court: It is obvious it is, that is what the lawsuit is about.

Mr. Collins: You may cross.

The Court: Any cross?

Mr. Melchior: Just a couple of questions, your Honor.

Cross Examination

Q. (By Mr. Melchior): You say Mr. Wall first invited your attention to the Green Forks tract, Mr. Ellison? A. Yes, he did.

Q. You knew who he was working for at that time, didn't you? A. Yes, I did.

Q. And then this inspection which you made together with Mr. Wall, could that fairly be described as a cruise of the timber?

A. Was it a cruise of the timber? [96]

Q. Yes, sir.

A. The first trip we made was a cruise you might say, a spot cruise as far as we went. Mr. Wall is quite an elderly man and he couldn't walk too far so we did look at one area. The main thing, he showed me where it was an——

Q. But it was of this time an appraisal?

A. It was a preliminary look, yes.

Q. Just a look around to see what it was worth? That didn't represent a commitment in any direction?

A. Well, I don't believe on that first look we

(Testimony of Robert F. Ellison.)

could determine what it was worth. It was a preliminary worth.

Q. And at all times that you went in there prior to the bid you dealt with Mr. Wall and with full knowledge of his capacity, isn't that right?

A. Well, I had full knowledge of his capacity, yes.

Q. Now one thing you said in your direct testimony was that "Northwest Door and I" bought this land. Who signed the contract with the owner of the timber?

A. Representative for Northwest Door Company signed the contract.

Q. Did you make any contract with the timber owner? A. Forest Service.

Q. The Forest Service did own the timber, didn't it? [97]

A. Yes. I didn't make any direct contract in my name.

Q. Was there anything done in your name contractually with the Forest Service at all?

A. Not in connection with the sale.

Q. Now with respect to this road building which you undertook that you described on your direct testimony, isn't it a fact that that is a normal incident of timbering operation, logging operations? Under appropriate circumstances?

A. I don't believe it is an accepted fact it would be normal operations.

The Court: I don't know that that means very much to me one way or not. Normally in order to

(Testimony of Robert F. Ellison.)

get in and log a piece of timber you have got to have roads and ways of getting it out. In that sense it certainly is a normal part of logging operations, isn't it?

The Witness: Maybe I misinterpret——

The Court: Well, I think that is why—that is why I interjected. One or the other of you must be thinking of different things because you certainly can't log a tract of timber without putting roads in and some way of getting out of there, can you?

The Witness: May I——

Q. That is all I had in mind and the question the judge asked you, that is what I meant to ask you. [98]

A. You have to have roads to get the timber out.

The Court: Roads or chutes or railroad or some way of getting the logs out of there, don't you?

The Witness: But I might say this: Ordinarily the road is fixed before the sale as you have certain specifications, the road is made that way. This happens to be an exception there where it was rather—it was more attractive, we might say, economically to make these changes. The Forest Service was very cooperative in allowing me to do this and the end result was that they were very happy because we came up with a better road than what they had originally planned.

The Court: But that was simply one of the things you understood by your contract with Northwest Door, was to provide this very sort of thing,

(Testimony of Robert F. Ellison.)

wasn't it, Mr. Ellison? It says so in black and white right in the contract.

The Witness: Well, my contract with Northwest Door was, of course, to remove the logs.

The Court: Yes, and it also provides that you are to go in and do the road work and whatever is necessary to bring them out, is that right?

The Witness: Right, right.

The Court: All right, anything else?

Mr. Melchior: Nothing further.

The Court: That is all, Mr. Ellison, you may step aside please. Anything else? [99]

Mr. Collins: The next thing, your Honor, is request for admission number six and ruling on objection thereon.

The Court: All right, number six. Now let's see, what is the status of this? The request for admission by the Plaintiff number six. That reads as follows:

"The Treasury Department does not deny any capital gains treatment to purchasers of timber from any federal or state agency including the Department of Agriculture where the purchaser cuts, sells or uses said timber after having held the purchase contract for more than six months prior to the beginning of a taxable year in which the timber is utilized or sold."

All right, what is the problem about that?

Mr. Collins: The defendant has interposed an objection to that. I think Mr. Melchior would prefer to state it.

Mr. Melchior: I will be glad to state it.

The Court: Go ahead.

Mr. Melchior: I believe that this is not the proper subject for request for admissions. I think it is directed to a question of law. It contains inferences about construction of a number of words having a legal meaning. In any event it relates to administrative practice. Could have no bearing on [100] the lawsuit.

The Court: That is the way it appeals to me, Mr. Collins. What have you to say about it?

Mr. Collins: Well, our answer to that, your Honor, is that what we are asking for is a fact. We want to know how they treat these, and administrative treatment is considered by the courts in some instances as an aid to construction of a statute.

The Court: Well, if there were some administrative ruling or something of that kind, that ought to be presented here, of course. That would be one thing, but the way this question is framed it does seem to me to involve elements that require interpretation of law, actually require interpretation of the terms you have used in stating the request. I can't see that there is any requirement of answering a request of that kind. Now if there be, if you are shooting at some interpretation, some regulation, something of that kind, that is a different thing. If there is something of that kind, certainly the Government must answer if there be such. Now maybe you can make a statement in connection

with this. It will solve the whole problem and we will have an end of it.

Mr. Melchior: I can do that.

The Court: Do that.

Mr. Melchior: I don't know what Mr. Collins [101] has up his sleeve, if there is. I have nothing up mine. If there is some published memorandum I think that would be subject to judicial notice anyway.

The Court: Of course it would.

Mr. Melchior: And if there is, I don't know.

The Court: That is the answer. Of course if there is such, of course I could take judicial knowledge of it. Are you aware of any regulation, interpretation or action of any kind by the Treasury Department placing an interpretation in this matter referred to in question six?

Mr. Melchior: No, your Honor. The only thing I can say is we took the position in the Carlen case and it was sustained by the Court that this time should be treated in one way, and we take the same position here. And the taxpayer knows because we assessed a deficiency.

The Court: Well, as far as your answer to *re-question* for admission is concerned, I take it your answer is that you are not aware of any Treasury Department regulation, interpretation or ruling of any kind that bears on the question presented?

Mr. Melchior: I can only speak for myself in that regard.

The Court: I understand, you are speaking for yourself. That is all you can do, of course.

Now if you have some regulation, interpretation [102] or you are aware of one that you want them to admit, if you will present it I will require them to answer that.

Mr. Collins: We frankly are not, your Honor.

The Court: That is the end of that then. Now what is next?

Mr. Collins: I would like to ask the Court to receive and consider as evidence the remainder of the requests for admission and the responses thereto.

The Court: That, of course, is a matter which follows as a matter from the rules.

Mr. Melchior: The ten days haven't expired. I think that is what Mr. Collins is driving at.

The Court: But you already said you are waiving the ten-day period and I am to interpret this record as though the ten days had expired.

Mr. Melchior: That is correct, your Honor.

The Court: Which I propose to do. All right, anything else?

Mr. Collins: The Plaintiffs rest, your Honor.

The Court: Very well.

Mr. Melchior: I call Mr. Tedrow. [103]

E. P. TEDROW

being first duly sworn on oath, was called as a witness on behalf of the Defendant and testified as follows:

Direct Examination

By Mr. Melchior:

The Clerk: State your full name and spell your last name.

(Testimony of E. P. Tedrow.)

The Witness: E. P. Tedrow, T-e-d-r-o-w.

Q. Where do you reside?

A. Vancouver, Washington.

Q. Where are you employed?

A. At Vancouver.

Q. In what capacity?

A. As Administrative Assistant Supervisor in connection with timber management.

Q. Of what business or company agency?

A. With the United States Forest Service, Pinchot National Forest.

Mr. Collins: I didn't get the name.

The Witness: Pinchot.

Q. Is that the forest in which the Green Forks is located? A. It is.

Q. And have you at this time personal custody of the records relating to the sale of timber from the Green Forks tract that is involved in this lawsuit? [104] A. I do.

Q. Have you inspected those files at my request?

A. Yes.

Q. What do those files indicate about the parties who had a contract right to cut timber owned by the Forest Service on that tract?

Mr. Collins: Just a moment, please, your Honor. I think we could save a lot of time here.

The Court: Good.

Mr. Collins: We certainly are willing to stipulate, admit and do not deny that the Forest Service contract which is in evidence is between two parties,

(Testimony of E. P. Tedrow.)

the Department of Agriculture and the Northwest Door Corporation.

The Court: Yes.

Mr. Collins: And if the purpose of the witness is simply to say that the contract means what it says, we will agree.

The Court: Yes, the contract and all other records of the timber management office with respect to the Pinchot National Forest, all reflect Northwest Door Company as the owner of the contract and the holder of the contract and having the right to remove, is that right?

The Witness: That is correct.

The Court: And Mr. Ellison is not mentioned in those records in any way as having that right?

The Witness: No.

Q. Is there any assignment of any kind recorded of that right?

Mr. Collins: We will stipulate there is not.

Mr. Melchior: That is all.

The Court: That is all, Mr. Tedrow, thank you. Anything else?

Mr. Melchior: No, we rest, your Honor.

Mr. Collins: Just a moment. I have a question.

The Court: I beg your pardon.

Cross Examination

Q. (By Mr. Collins): Now, Mr. Tedrow, do those records show that Vancouver Plywood Corporation had any interest in the timber contract?

A. They do not.

(Testimony of E. P. Tedrow.)

Q. Do those records show that at any time after the contract was let Vancouver Plywood Corporation acquired any interest in it?

A. They do not.

Mr. Collins: That is all.

The Court: That is all, Mr. Tedrow, you are excused and may leave whenever you wish. Government rests?

Mr. Melchior: It has rested, your Honor. [106]

The Court: All right, anything further? Both parties rest?

Mr. Collins: We have no rebuttal, your Honor.

The Court: Very well. I think we will go ahead and present the balance of the case. In all fairness perhaps in order that you may correct any misapprehension that I may have, I will outline to you briefly my tentative views of the case and then you can show me wherein I am wrong.

The matter of whether or no capital gains treatment is to be permitted in a given case or not, is strictly a matter of what the statute and any regulations promulgated pursuant thereto provide. In other words, it is not a matter that involves any element of discretion or so-called barnyard equity or anything of that kind. It is purely and strictly a matter of what the laws provide. If the laws provide that the gain is to be, capital gains treatment is to be permitted, then it is to be permitted no matter how we might view that or how we might like it to be otherwise.

Now in this type of situation we are always con-

fronted with a strict and literal interpretation of what the statute says. In other words, in order to be eligible for capital gains treatment a taxpayer must fall strictly and squarely and wholly within [107] the requirements of law in that particular. However happy or unhappy that result is, is a matter to be taken up with Congress and not with the Court.

Now the section in question, namely 117 (k) 1 of Title 26 reads in brief:

“If the taxpayer so elects upon his return for a taxable year the cutting of timber for sale or for use in the taxpayer’s trade or business during such year by the taxpayer who owns or has a contract right to cut such timber providing he owned it or held the contract right for a period more than six months prior to the beginning of the year, shall be considered as a sale——”

and so on, and therein lies the basis of whether or not capital gains treatment can be applied.

Now the Ninth Circuit has passed on a situation closely, if not wholly, analagous, namely in this Carlen case in 220 Fed. (2d) at 338. I have examined the Carlen case quite closely, re-read it several times, and it seems to me that it is inescapable that the situation presented in the present case if interpreted in the light of the Carlen case, requires a holding that the plaintiff is not entitled to a capital gains treatment upon the cutting of this timber. Now, wholly aside from the parol evidence [108] rule, assuming for the sake of the argument that all of the evidence admitted here concerning what

Mr. Ellison thought about it and why they did this, that and the other, assuming for the sake of the argument that all of that was admissible and should be taken in mind in interpreting this contract, even so I can't see how we can possibly get away from the terms of this contract.

This contract, Exhibit 4, makes it unmistakably plain the drafter of that contract, Mr. Eisenhower, apparently went to great lengths to repeat and reiterate time after time emphatically, in the most unreserved terms, that Ellison was merely performing services, that he was merely logging this timber which was owned by the Northwest Door, remained the property of Northwest Door from beginning to end. Under no conceivable situation under this contract did this timber ever come under the ownership of Ellison.

Now the only conceivable point that I can see in the case to differentiate this case from what is said in the Carlen case is this one clause in Section 117 (k) 1, namely, "by the taxpayer who has a contract right to cut such timber." Query: Does that mean that because Ellison had a contract with Northwest Door under which he was permitted to cut this timber, does that mean that he then qualifies within the meaning of this section? Or does this [109] clause, "taxpayer who has a contract right to cut" mean that he is in our context the one who has the contract right with the Government to cut the timber?

Now concededly that point is not squarely and exactly covered in the Carlen decision. At least it

doesn't seem so to me, but it is my judgment that considering the subject matter, namely capital gains treatment, which basically is founded on the idea that property has been acquired and held for a given period of time and then sold and any gain on that is a capital gain rather than normal income, conceding that that is the basic subject matter of this section 117 (k) 1, it just seems a wide stretch of interpretation to say that this taxpayer who has a contract right to cut means someone who is merely rendering logging services for the one who has the contract right to cut the timber.

Now those are my views and I will be glad to have you show me where I am wrong.

(Whereupon, Mr. Collins presented his closing argument and the following proceedings were had, to-wit:) [110]

The Court: Well, gentlemen, in so far as any issue of fact is concerned, if there be one in the case, and irrespective of the parol evidence rule or any other so-called technical rule pertaining either to the admission of evidence or the interpretation of contracts, I can only say that I have not the slightest doubt in my mind but that at the time this contract, Exhibit 3, was entered into it meant to the parties exactly what it says.

The contract was not lightly entered into. It was not some informal thing that parties unversed in law might draft, some exchange of letters that would in law constitute a contract, but which were drafted by persons unlearned in the law. It was only drafted after very full exploration of the vari-

ous ways in which those logs might be gotten out of that Green Fork tract, and after having explored first the idea of putting the title to the timber or the cut logs in Mr. Ellison and taking back some form of mortgage security or otherwise, that was abandoned for various reasons. And because of the situation at the time the only way that the Northwest Door was ready and willing to go forward with this was on the terms that are contained in this contract and essentially that the contract provides in the most unmistakable terms, reiterated and emphatically stated that under no circumstances whatever is Ellison to become the owner of the logs or to have any right, title or interest therein. [111]

I am now quoting from paragraph 5 of the contract. All that he was to be entitled to was compensation for his services in doing the logging, getting the logs out of there. It would just be a part of what I believe to be the true facts of the case. As well as written documents solemnly entered into, drafted by competent, able, experienced counsel. When this agreement of contract, Exhibit 3, was drafted, it was drafted not by some naive person unfamiliar with the meaning of the words he was drafting, but a person who knew full well exactly what the words meant and what they were intended to convey, and I have no doubt in my mind whatsoever that it was intended by both parties that it be so. Consequently it is my judgment that under no conceivable circumstances did Ellison acquire title either legal or equitable or otherwise in the

timber or the logs. If so, then 117 (k) 2 has no application because 117 (k) 2 leads off with the words, "In case of disposal of the timber by the owner thereof under any form of contract—" and so forth and so forth and so forth. Ellison was under no conceivable circumstances the owner of this timber either as it stood before it was cut, or after it was cut or after it was on the trucks or down at the pond or any other place.

In my judgment neither subsection 1 nor [112] subsection 2 are met by what seems to me to be the just unquestioned facts in the case. So as far as any factfinding is concerned, I am bound in good conscience to try, much as I'd like to give this tax relief to Mr. Ellison, particularly in view of the fact that Northwest Door didn't claim it, but I am not here to decide cases on any such basis as that. I have taken an oath to decide them according to my conscience and judgment, however good or bad that may be. That is the way I have got to decide them.

In my judgment Mr. Ellison has not qualified for the relief he seeks, regrettable as that may be. That is the judgment of the Court. [113]

PLAINTIFFS' EXHIBIT No. 3

AGREEMENT

This agreement, made and entered into, in triplicate, this 9th day of December, 1947, by and between Northwest Door Company, a Washington

corporation, and Vancouver Plywood Corporation, a Washington corporation, hereinafter referred to as the Owners, Parties of the First Part, and Robert Ellison, hereinafter referred to as the Logger, Party of the Second Part,

Witnesseth:

Whereas the Owners, acting through the Northwest Door Company, have entered into an agreement with the United States Department of Agriculture, Forest Service, under date of September 4, 1947, for the purchase of certain timber on the headwaters of Green Fork Creek, which is tributary to the East Fork of Lewis River, in the State of Washington, the total of which timber is approximately 30,387,000 feet board measure, more or less, all of which is more particularly described and referred to in the agreement herein specified, a copy of which is attached to this agreement for more particularity, and

Whereas the Logger is an experienced logging operator and has the equipment, machinery and men necessary for the logging of said timber, now, therefore,

It is hereby agreed between the parties hereto as follows:

1. The Logger does hereby agree to fall, buck, yard, load and transport to navigable water in the Columbia River all of the timber standing, lying or being on the property described in the Forest Service agreement hereinabove referred to where such logs, timber and forest products will be

dumped, rafted and scaled, all of which shall be at the sole cost and expense of the Logger.

2. The Logger hereby agrees to cut and remove said timber and forest products all in accordance with the terms, conditions and specifications set out in the Forest Service agreement hereinabove referred to.

3. The Logger agrees that he will at his own cost and expense construct and maintain any and all roads necessary for the removal of said timber and in accordance with the Forest Service agreement hereinabove referred to, and the direction of the Supervisor of Forest Service.

4. The Logger agrees that he will perform each and every condition of the Forest Service contract hereinabove referred to required under the terms thereof to be performed by the Northwest Door Company and that he will keep and save harmless the Northwest Door Company and the Vancouver Plywood Corporation from any and all claims, demands or liabilities of the United States Agricultural Department, Forest Service, or of any other person, firm or corporation. The Logger further agrees that he will perform said logging services in a good and workmanlike manner pursuant to the customs and practices of the Northwest Logging Industry, and more particularly in accordance with the rules and regulations of the Forestry Service of the United States of America and of the State of Washington, that he will pay and discharge all industrial insurance premiums and other taxes or assessments levied by any government, state or sub-

division of either upon the payroll or upon the business of said Logger to the end that said logs will be delivered to the Parties of the First Part free and clear of any claim, demand or liability of the Logger or any person, firm or corporation claiming by, through or under him.

5. It is hereby agreed between all of the parties hereto that said logs, timber and forest products shall be and remain the joint property of the Parties of the First Part herein mentioned and that the same shall be divided or otherwise disposed of in accordance with agreement between the Parties of the First Part, and that the Party of the Second Part shall not have any right, title or interest therein other than the right to receive his compensation herein agreed to be paid.

6. The Parties of the First Part agree to pay to the Logger for his services in logging and delivering said timber, logs and forest products to the Columbia River at the point above designated, where they will be boomed, rafted and scaled by a representative of the Columbia River Scaling Bureau or a representative of the Puget Sound Scaling and Grading Bureau, or such other scaler as the parties hereto may agree upon, but at the expense of the Logger, the Columbia River market price for said logs as determined on the day of scaling, less, however, the amount which the parties of the First Part are required to pay to the United States Agricultural Department, Forest Service, as stumpage or other costs as provided in said agreement with the Forest Service as hereinabove re-

ferred to; provided, however, that if the Parties of the First Part shall hereafter establish a reloading station at a point nearer the timber than the Wall Boom situate at Woodland, Washington, then the Parties of the First Part shall deduct from the amount otherwise payable to the Logger for logs delivered to such reload, the transportation costs of the logs, timber and forest products from the reload to the Wall Boom at Woodland, Washington, as determined by the hauling charges established by the State of Washington. If such reload is established, then the Logger shall deliver said logs, timber and forest products to such reload where he shall load them on railroad cars at his own expense.

7. It is the intention of this agreement that the compensation hereinabove agreed to be paid to the Logger shall be in full payment and discharge of all obligations due him from the Parties of the First Part.

8. It is further agreed between the parties that if the Logger shall request the Parties of the First Part to advance him any money for the construction of the road into the timber that the Parties of the First Part will advance such reasonable amount as they deem necessary to complete such road construction if such road has first been approved by them, and the amount so advanced shall be repaid to the Parties of the First Part by the Logger; provided, however, the Parties of the First Part are hereby authorized to deduct from each and every raft or load of logs, timber or forest

products delivered to them by the Logger a sum per thousand feet board measure of such products so delivered equal to the amount of money so advanced by the Parties of the First Part divided by the remaining number of such one thousand feet unit of logs, timber and forest products to be cut and transported over such road; provided, however, all of such money so advanced for road purposes shall be repaid by the Logger from the first 25 million feet board measure of such timber, logs and forest products cut and removed by the Logger from the lands described in the Forest Service contract above referred to.

9. The Logger agrees that he will commence the construction of roads and the logging of timber under said Forest Service contract above referred to not later than November 1, 1947, and will thereafter continuously and diligently operate under said agreement in order to remove all of the timber covered by said Forest Service contract as speedily as possible.

10. It is further agreed between the parties that if the Logger shall violate any of the terms or conditions of the Forest Service agreement above referred to, or this agreement, the Parties of the First Part may cancel and terminate this agreement and forfeit any interest of the Logger therein, including any logs or timber felled or bucked, or not otherwise delivered to the Parties of the First Part. In the event of such cancellation or termination of this agreement, the Parties of the First Part may take and use any or all of the

equipment, machinery, tools, buildings, trucks, roads, easements and other rights, privileges or property used by the Logger in the work of logging said timber herein described and use the same for the purpose of completing the logging of said premises, and at the completion of said logging, will return such equipment to the Logger in as good condition as when taken or received by the Parties of the First Part, reasonable wear and tear and damage by the elements excepted.

In witness whereof, the parties hereto have executed this agreement the day and year first above written.

Northwest Door Company

/s/ By Geo. Raknes,

Its Vice President

Vancouver Plywood Corporation

Vancouver Plywood & Veneer Co.

/s/ By J. Powers,

Its Secretary and General Manager

Owners, Parties of the First Part

/s/ R. F. Ellison,

Logger, Party of the Second Part

PLAINTIFFS' EXHIBIT No. 6

MINUTES OF MEETING

Vancouver Plywood Company, Vancouver, Wash.

October 24, 1947

Present: J. Powers, C. Hovey, H. E. Tenzler and Geo. Raknes.

Subject: Green Fork Contract.

Prior to meeting with Ellison, discussed items mentioned by Ellison to Wall and other points in Contract commented on in Powers letter.

Agreed contract should not contain any provision regarding sharing loss if Ellison suffered a loss on entire job. Also not to bring matter up in meeting with Ellison.

Informed Powers that we had planned, in estimating for Green Fork bid, to put in a reload at Moulton. Since it did not seem desirable for them to receive logs by rail asked if they prefer that we adjust with Ellison for any extra costs in the Reload and we own Reload, or if they wished it to be a partnership venture. They preferred that it be partnership.

Since logs may all be shipped to Puget Sound they indicated a readiness for us to turn over Columbia River logs in lieu of Green Fork logs. They were willing to look at Tillamook logs—not ready to agree to take until they see them. Brought up the matter of taking over Toutle River timber from us and specifically mentioned the NE/¼ of S12 T9N R3E. This piece contains 3577M of which 2530 is OG fir and cost an average of \$17.50 at the State Sale.

All agreed that sawmill or pulp logs have no trading value at present and seemed indifferent now who gets. Said they do peel Noble Fir. Felt division could be arranged later when logs start coming out.

Copies—Tenzler, Raknes, Reinsch

PLAINTIFFS' EXHIBIT No. 7

Northwest Door Co., Tacoma, Washington
Inter-Department Correspondence

To: H. E. Tenzler

August 4, 1948

From: Geo. Raknes

Subject: Green Forks timber exchange with Vancouver Plywood Co.

After further consideration of the above subject and after studying the values indicated for this timber based on current log prices, I have come to the opinion that it would be too difficult to agree with them on a purchase price, and I suggest that we make the following proposal to them in a shape of a letter:

Vancouver Plywood Company
Vancouver, Washington
Gentlemen:

In answer to the proposal contained in your letter of May 4, we believe that there are considerations involved which would make it inequitable to make this exchange on the basis of selling you the timber you suggest at our cost. As you know, on the Green Forks timber neither of us will make any gain or loss on the logs, as the contract has been turned over to Ellison. All we will receive are logs at current market prices. In the case of the state timber in the Toutle River area, we purchased this when timber prices were considerably lower than they are at present. Rather than attempt to put values on this timber based on current replacement costs, we want to make the following suggestion:

We own three tracts on the Toutle River, one in T9N, R4E, and the other two in T9N, R3E. The piece in Section 12, T9N, R4E all lies on one side of the river and will not involve any bridge construction. The other two pieces are almost adjacent but timber lies on both sides of the river. Between these two pieces lies the NW $\frac{1}{4}$ of Section 12, (T9N, R3E, which you own. We wish to retain the tract in Section 12, 9N, 4E, as a backlog since it can be logged on short notice if we find ourselves in an emergency for logs. We propose to sell you all the logs produced from the NE $\frac{1}{4}$ of Sec. 12, T9N, R3E, Application No. 18691, and from the W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ totaling 280 acres in Section 2, T9N, R3E. The timber on Section 12 contains 4,514 M ft. per Reilly's cruise and the timber in Section 2 contains 7,065 M ft. according to the State's appraisal cruise.

In our field work in appraising this timber before bidding on this sale, we estimated 65% of the fir on Section 2 was peelable and 58% of the fir on Section 12 was peelable. This would produce a total of 4,148 M ft. of peelers. The remainder of the stand on these two pieces would be 4,939 M ft. of other species. Your estimate of the peelers from the Green Forks tract was 2,850 M ft.

You will receive less sawmill and pulp type logs by this arrangement than we will and you will receive more peeler type logs than we will. It is difficult to appraise the trading value of these other logs at present but any advantage we might have in this footage we believe would be offset by the

higher grade logs you would be receiving as well as the larger footage of peeler logs that you would be receiving.

We believe trading on this basis would be equitable to both parties and would provide you with more timber for your Rocky Point Reload. It would be our plan to reimburse you for all money you have expended on the Green Forks purchase, and we would contract, as suggested by Mr. Hovey, to have these logs logged and delivered to you at Rocky Point.

Since our timber adjoins, we would have the lines surveyed and blazed, and we would provide suitable branding hammers so that the logger could brand all logs from our timber. We would pay the logger for his logging on the basis of \$24 camp run delivered to the reload and would pay the dumping and rafting charge and sell you all logs on prevailing market prices.

Mr. Raknes will call at your office within the next day or two to discuss this further with you and see if this plan is acceptable.

Yours truly,

NWD CO.

GR:dd

cc:HGR

[Endorsed]: Filed March 24, 1956.

[Endorsed]: No. 15318. United States Court of Appeals for the Ninth Circuit. Robert F. Ellison and Cleo A. (Ellison) Walker, Appellants, vs. William E. Frank, United States District Director of Internal Revenue for the District of Washington and Territory of Alaska, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: February 25, 1956.

Docketed: October 5, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15318

ROBERT F. ELLISON and CLEO A. (ELLI-
SON) WALKER, Appellants,

vs.

WILLIAM E. FRANK, United States District Di-
rector of Bureau of Internal Revenue for the
State of Washington and the Territory of
Alaska, Appellee.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellants hereby adopt as their statement of points and designation of record required by Rule 17 (6) of the Rules of this Court, the appellants'

statement of points and designation of contents of record on appeal appearing in the typewritten transcript of record in this cause certified by the Clerk of the United States District Court, Western District of Washington, Southern Division, and filed herein.

/s/ HUGH B. COLLINS

Of Attorneys for Appellants
Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 5, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION FOR THE SUBMISSION OF
THE ORIGINALS OF EXHIBITS IN
LIEU OF COPIES THEREOF

It is hereby agreed and stipulated by and between counsel for the respective parties hereto, that the Plaintiffs' Exhibits 1, 2, 4, 5, 8, and 9 and Defendant's Exhibit A be submitted to the United States Court of Appeals for the Ninth Circuit in lieu of printed copies thereof.

Dated: October 11, 1956.

/s/ JOHN L. FLYNN

Of Attorneys for Appellants

/s/ CHARLES K. RICE,

Assistant Attorney General,
Attorney for Appellee

[Endorsed]: Filed October 30, 1956. Paul P. O'Brien, Clerk.



In the
United States Court of Appeals
For the Ninth Circuit

ROBERT F. ELLISON and
Cleo A. (Ellison) Walker, *Appellants*,

v.

WILLIAM E. FRANK, United States
District Director of Bureau of Internal
Revenue for the State of Washington
and the Territory of Alaska, *Appellee*.

NO. 15318

APPELLANTS' BRIEF

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

JOHN L. FLYNN,
613 United States National Bank Building,
Portland, Oregon

HUGH B. COLLINS,
107 East Main Street,
Medford, Oregon

PHILIP A. LEVIN,
808 Equitable Building,
Portland, Oregon

Attorneys for Appellants.

FILED

FEB - 1 1957

PAUL P. O'BRIEN, CLERK



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In the
United States Court of Appeals
For the Ninth Circuit

ROBERT F. ELLISON and
Cleo A. (Ellison) Walker, *Appellants*,

v.

WILLIAM E. FRANK, United States
District Director of Bureau of Internal
Revenue for the State of Washington
and the Territory of Alaska, *Appellee*.

NO. 15318

APPELLANTS' BRIEF

Appeal from the United States District Court for the Western District
of Washington, Southern Division.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered by the United States District Court for the District of Washington, Southern Division. Appellants brought suit for refund of claimed overpayment of federal individual income taxes for the year 1949 paid to appellee (R.3). The United States District Court for the Western District of Washington, Southern Division, had jurisdic-

tion under 28 U.S.C. Sec. 1340 (R.25). The defendant appeared and defended the action on the merits (R.6).

The United States District Court entered final judgment adverse to appellants (R.25), who gave timely notice of appeal (R.26).

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment under provisions of 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

This controversy relates to the recovery of individual income taxes for the calendar year 1949. The amount in controversy, \$11,361.10, represents the difference between federal income taxes at normal rates upon the sum of \$50,380.06 and the amount of tax upon that sum at the rate applicable to capital gains.

During the year 1947, Northwest Door Company, hereinafter called Northwest, in accordance with a prior agreement with Robert F. Ellison, executed a timber purchase contract with the Department of Agriculture, Forest Service. (R.45 Ex. 2). This contract was not formally assigned to Ellison by Northwest. During the year 1949 Ellison removed a portion of the timber and elected to report a part of the profit thereon, \$50,380.06, as capital gains under

the provisions of Sec. 117 (k), I.R.C. 1939. The income tax return of Robert F. Ellison was filed jointly with his wife, Cleo A. (Ellison) Walker, and the tax paid thereon for the year 1949 included taxes upon \$50,-380.06 at the rate applicable to capital gains. This return was filed with, and the payments of income tax were made to, the Collector of Internal Revenue, Tacoma, Washington.

Upon audit of Ellison's return, the Commissioner of Internal Revenue determined that Ellison was not entitled to the benefits of Sec. 117 (k), I.R.C. 1939 upon timber removed by him and assessed a deficiency of \$11,839.10, of which \$11,361.10 represented the tax at ordinary rates upon the profits on timber reported by Ellison as subject to capital gains.

Appellants filed claim for refund of the tax paid to appellee and upon failure of the appellee to act thereon brought suit for refund. At trial was adduced a written instrument to which Ellison and Northwest were parties; this instrument stated that Ellison had no right, title or interest in the timber or the logs to be obtained therefrom. (R.43, 127 Exhibit 3). Other evidence was that prior to bidding on the timber Northwest had agreed to loan Ellison what he needed to acquire and log the timber and that the contract between the Department of Agriculture and Northwest

was retained in Northwest's name to secure loans to Ellison and to secure its compensation for making the loans to Ellison, i.e., Ellison's agreement to sell the logs to Northwest; which agreement Ellison carried out.

The court held that in the years 1947 through 1949, Ellison was self employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest in Southwestern Washington (R.25).

For review are the trial court's findings of fact that:

1. Ellison had no right, title or interest in the timber at any time. He was to perform the service of logging the timber for Northwest Door Company and was to be paid for his services only. The payment was to be measured by the market value of the logs. Title to the timber lay at all pertinent times only in the United States and in Northwest Door Company, but not in Ellison. (R.23-24).

2. The present taxpayers (Ellision) did not at any time own or have a contract right to cut the Green Forks timber, nor did they cut said timber for use in their own business or for resale. The Commissioner correctly determined that the gain from Ellison's logging operations was taxable to the taxpayers as or-

dinary income. Taxpayers did not overpay any tax and are entitled to no recovery. (R.25).

QUESTIONS PRESENTED

1. Does not the evidence require a finding that Ellison was the equitable owner of the timber?

2. Does the phrase contained in Sec. 117 (k) (1) "by the taxpayer who owns or has a contract right to cut such timber" entitle the equitable owner of the contract to the benefits of this section, or does the phrase restrict the benefits of the statute to the individual who has both legal and equitable title?

3. Is a taxpayer precluded from showing that a written instrument between himself and a third party does not in fact reflect the entire agreement between the parties, where the parties are in agreement it does not and the parties' performance bears this out?

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that Exhibit 2, the contract between Northwest Door Company and the Department of Agriculture, and Exhibit 3, the contract between Ellison and Northwest Door Company, were self limiting and represented the entire transaction between the parties; and that the transactions

actually consummated between these parties could not be shown by other evidence.

2. The District Court erred in finding that Ellison did not own equitable title to the logs he harvested and that Ellison had no proprietary interest in the timber, and that the logs removed from the Green Forks tract were not cut and sold in the course of Ellison's trade or business.

SUMMARY OF ARGUMENT

I

During the year 1947, the Northwest Door Company entered into an agreement for the purchase of timber on a "pay as cut basis" from the Department of Agriculture, Forest Service. The uncontradicted testimony in this case is that the purchase was made by Northwest at the behest and for the benefit of Robert F. Ellison and that the contract was assigned by Northwest to Ellison with Northwest remaining a party thereto as guarantor although formal assignment was not recorded upon the records of the Forest Service. The evidence and testimony also establishes that both the Forest Service and Northwest treated and dealt with Ellison in all matters of substance relating to the contract as the assignee and beneficial owner of the contract right to cut and remove the timber.

To provide security for Northwest's loans and its right to first refusal of logs from the tract, Northwest and Ellison entered into an agreement providing that title and interest in the timber and logs belonged solely to Northwest. The uncontradicted testimony and the evidence in this case was that the agreement was intended and used as a security device only and that Northwest and the Forest Service dealt with Ellison in all matters of substance relating to the timber and the logs as the owner and the real party in interest.

II

In determining the property rights of Ellison in the timber contract and the logs obtained from the tract, the Court based its findings and conclusions solely upon the written agreement for security without giving weight to other evidence and the testimony of the witnesses in the case as though the written agreement represented the entire transaction. The undisputed facts in this case establish that the agreement was written solely for security purposes and that Ellison was the equitable, beneficial owner of the contract right to cut the timber and of the logs obtained therefrom. It was error for the Court to define the rights of Ellison solely upon the written agreement without consideration of extrinsic evidence explanatory of its

purpose and the relation of the contract to the whole transaction.

The restriction placed upon itself by the Court prevented the Court's following the well established rule that in tax matters substance prevails over form. The restriction also prevented the Court's following the law of the State of Washington in determining the character of the contract between Northwest Door Company and Robert F. Ellison and the rights of the parties, with the result that those findings of the Court relating to the property rights of Robert F. Ellison in the contract for cutting and purchase of the timber and the logs obtained therefrom are clearly erroneous.

III

Because the Court restricted its conclusions to the rights of the parties as determined by it from the written agreement between Northwest and Ellison, the Court was unable to consider the differences between the instant case and that of *Helga Carlen* decided in this Court, 220 F.2d 338 (1955).

The basic distinction is that in the instant case, there was uncontradicted testimony from the President of Northwest and its counsel that the purpose of the contract was solely for security of loans to be made in

the amount of \$100,000.00, and all of the evidence corroborates this testimony. In the *Carlen* case, the contract reserving title accurately reflected the status of the parties.

The uncontroverted testimony in this case is that the timber was purchased at the behest and for the benefit of Ellison who was treated by all parties as the real party in interest and the owner of the contract to cut the timber and of the logs therefrom; in the *Carlen* case, the timber was purchased before the logging partnership was even formed.

In the instant case, Northwest did not buy the logs from Ellison until a consumer had been found; in the *Carlen* case, partnership was paid when the logs were dumped.

In the instant case, Ellison had complete discretion in regard to performance of the contract subject of course to the terms of the agreement with the Forest Service; in *Carlen*, the partnership agreed to work not less than forty-eight hours per week.

The Court found as a fact that Ellison was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest. The Tax Court did not so find in the *Carlen* case.

The Court's failure to consider relevant evidence prevented a finding that the Forest Service contract had been assigned to Ellison and that he was the owner of the contract right to cut the timber and possessed equitable title to the timber on the Green Forks tract and to the logs obtained therefrom. As a result of this error, the Court found that Ellison owned no proprietary interest in the timber cutting contract, the timber, or the logs obtained therefrom, and that Ellison was not entitled to the benefits of Section 117 (k) I.R.C. (1939).

The judgment should be reversed for the Court's failure to consider all of the evidence in this case.

ARGUMENT

I

All evidence was that Northwest held the Forest Service contract for Ellison's benefit as security for loans and to secure its compensation for making the loans, i.e., Ellison's agreement to sell the logs to Northwest.

SUMMARY OF EVIDENCE

Robert F. Ellison and Cleo A. (Ellison) Walker, appellants here (plaintiffs below) were during the year 1949 husband and wife residing at Woodland, Wash-

ington. The appellants filed joint federal income tax returns for the year 1949 with the Collector of Internal Revenue, Tacoma, Washington. Cleo A. (Ellison) Walker, one of the appellants herein, appears solely by reason of the filing of a joint return (R.12).

During the calendar years 1947 through 1949 inclusive, the appellant, Robert F. Ellison, was self employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest (R.25). He was a logger, a man who goes into the woods, acquires timber, builds his own roads, and puts the logs into the market and sells them (R.87).

Northwest was a Washington corporation (R.13), engaged in the business of manufacturing fir plywood and fir doors. Northwest's plant utilized a grade of logs termed "peelers" (R.37).

During the years 1947 through 1949, Northwest acquired the logs required for plywood manufacture from two sources; purchases upon the open market and through the financing of the purchase of timber by loggers who agreed to sell the logs to be obtained from the tract to Northwest (R.37, 73).

In those instances where Northwest assisted the logger to obtain timber, it was customary for North-

west to secure its advances and other interests by means of a written contract or agreement. The precise nature of the security device to be used was left to the company's counsel after conferences with the President of Northwest, and was determined by the financial stability of the logger (R.38, 55, 56, 57, 61).

Theodore Franklin Wall, was employed January 1, 1947, by Northwest as the manager of a log storage and booming grounds (previously owned and operated by himself) near Woodland, Washington (R.80).

During the year 1946 (prior to his employment by Northwest), Wall had been requested by the United States Department of Agriculture, Forest Service, to look at a tract of timber on Green Forks Creek. This tract is hereinafter referred to as Green Forks. The timber was to be offered by the Forest Service at public sale (R.82). Shortly after this, Wall discussed this tract with Ellison who was looking for a logging operation (R.82, 85).

Wall had been instructed by Northwest to look for timber. He was aware that Ellison was looking for a logging operation; therefore Wall and Ellison looked over the Green Forks tract together at different times to see whether the timber could be taken out profitably. Both agreed that Ellison would require some one to finance the purchase (R.82, 83).

Prior to the time the Green Forks Tract was offered for sale, Ellison laid out road lines through the Tract and discussed with Wall the cost of removing the timber and the funds required by Ellison to finance the operation. Both agreed that from \$75,000 to \$100,000 would be required. Wall and Ellison also discussed the maximum sum Ellison would pay for the timber, which information Wall transmitted to Northwest (R.84, 85, 107), and to Northwest's Counsel with whom he discussed the amount of funds required by Ellison for the purchase and logging of the timber and Ellison's security for the proposed financing (R.52).

It was eventually decided after conferences between the President of Northwest and the Secretary of the corporation and its counsel, Edgar N. Eisenhower, that the purchase of the Green Forks Tract for Ellison would be financed by Northwest (R.48, 49, 56). In accordance with that decision, Northwest bid in the Green Forks timber at the Forest Service sale (R.45), with the intention of having Ellison perform the Forest Service contract and sell the logs to Northwest (R.52, 95). The contract between the Forest Service and Northwest for purchase of timber in the Green Forks Tract is dated September 8, 1947, and is identified as Exhibit 2 (R.45).

Eisenhower had been instructed to secure Northwest for advances to be made to Ellison and for the delivery of logs by Ellison from the Green Forks Tract, which Northwest desired to use in its plywood plant (R.52, 53). After considering all possibilities for security, including a loan on Ellison's equipment (R.61), Eisenhower adopted the security device which is Exhibit 3 (R.43) as "The best kind of security that I could get for my client" (R.58). Under this contract, executed in December, 1947, * Ellison borrowed \$100,000.00 from Northwest in 1948 (R.70, 110).

In his dealings with the Forest Service and with Northwest Door, Ellison at all times treated the timber as his own (R.112).

In addition to paying Northwest the sums to be transmitted by Northwest to the Forest Service for stumpage on timber removed by him, Ellison also reimbursed Northwest for the cost of the timber cutting bond furnished to the Forest Service in connection with the Green Forks contract (Ex. 9, R.68, 70, 78-79). In all practical matters relating to performance of the contract including the provisions for cleanup and slash disposal, settlement of the problem with the Forest

* Another Washington Corporation, Vancouver Plywood Corporation was brought into the transaction at the last minute. (R.13, 56). It was stipulated (R.65-66) that before any harvesting of timber took place, Vancouver Plywood Corporation withdrew from the deal.

Service was conducted by Ellison alone (R.94). Ellison dealt directly with the Forest Service without consulting Northwest in regard to making changes in the road adopted by the Forest Service. He also arranged an exchange of timber owned by the Forest Service for timber included in the original contract without requesting or obtaining prior approval from Northwest (R.101, 108-109, 110-111).

Northwest also treated the timber as the property of Ellison and charged the logs purchased from him to their log purchase account after deducting a cash discount for prompt payment (R.70, 76, 78), as distinguished from the accounts maintained with contractors who performed services for a fixed fee from whom no discount was claimed (R.70, 77, 78). Northwest paid Ellison the market price for the logs (R.130). Reinsch, Northwest's manager of log procurement testified that the risk of any loss of the logs before delivery was on Ellison (R.91). Northwest claimed no gain or loss on the Green Forks transaction (R.68-69), and as previously set forth, collected the cost of the indemnity bond from Ellison (R.70), as would a guarantor of Ellison's contract with the Forest Service. The transaction with Ellison was handled by Northwest in the same manner as other deals in which Northwest financed loggers (R.76).

Finally, over the objection of the District Director (R.64-67), there was admitted an inter-office memorandum (Ex. 7), between two officers of Northwest regarding the Green Forks deal, in which the following language was suggested for a proposed letter to Vancouver Plywood Corporation (R.135):

“As you know, on the Green Forks timber neither of us will make any gain or loss on the logs, as the contract has been turned over to Ellison. All we will receive are logs at current market prices.”

Effect of Evidence as showing Equitable Title in Ellison

Although the naked legal title to the timber passed directly from the Forest Service to Northwest, and was never in Ellison, all parties—the Forest Service, Northwest, and Ellison himself—treated Ellison throughout as the owner of the contract. As a matter of bookkeeping on Northwest's books, practical day to day dealing with the Forest Service, and economic interest in the value of the timber, this is precisely what he was. Northwest did not have to pay the Forest Service for the logs until they were scaled on delivery to Northwest (R.75-76). Until that point, all risk of loss was on Ellison (R.91). All risk of market fluctuation was also on Ellison until that point, and the court so found (R.24). Northwest had no interest in the transaction

except the obtaining of a supply of logs at market prices and recouping its advances. The real equity in the timber, in the sense of control, economic risk, and beneficial interest, was in Ellison. He dealt directly with the Forest Service, without the intervention of Northwest, not only in regard to the operating details of the operation (R.91-92), but also negotiated with the Forest Service a substitution of a tract of timber which was not included in their contract with Northwest for one that was (R.101, 110). Both the President of Northwest and its then counsel testified without contradiction that security was the only purpose for which title was retained (R.38-39, 52, 58, 61).

The foregoing testimony on this subject came entirely from officers and agents of Northwest, with no interest in the outcome of this litigation and was corroborated by Ellison. None of it was contradicted, and it was entirely consistent with the documents and other circumstances of the case.

In fairness to this Court, it should be pointed out at this point that the District Court did not arrive at this conclusion. Its finding 9 (R.23) is as follows:

“9. The foregoing contract (i.e., Exhibit 3) was drafted after a full exploration of the situation by all concerned, and reflected the intentions of the parties precisely. Its provisions are clear and unambiguous. If the contract be subject to parol con-

struction, then the evidence fully shows that the contract meant what it said.”

It is perfectly true that Exhibit 3 was drafted after a full exploration of the situation, and that its provisions are clear and unambiguous. Equally clear and unambiguous, however, was the testimony of both Tenzler, the President of Northwest, and Eisenhower, its counsel, that the sole function of the contract was as a security device. When viewed in this context, it becomes apparent how the provisions of the contract can be clear and unambiguous and yet not, to use the court's phrase, mean what they say. Although the contract provides that all title to the logs remains in Northwest throughout (R.130), and that Ellison is to be paid for “services” (R.130), it must be accepted that the retention of title was solely for the purpose of security, or else the uncontradicted, unambiguous testimony of disinterested witnesses must be rejected as false. This evidence, moreover, was not inherently improbable, although in contradiction to the formal terms of a written instrument. It was completely consistent with the functions and purposes of that instrument, and served to explain its operation. Moreover, the practical construction of the instrument, adopted by all parties, shows that it was treated as a security device, and not as establishing the beneficial interest in the timber.

In this connection, it is of particular cogency as corroboration of the purpose of the document, that Northwest treated other logs sold by Ellison to Northwest in the manner that logs from the Green Forks Tract were treated, and that Northwest charged and deducted from Ellison only the exact amount required to pay the Forest Service for the timber and no more. Northwest did not buy the logs from Ellison until a consumer had been found, at which time it deducted a cash discount for payment within ten days of that date. (R.76). Ellison thus permitted Northwest to treat him as the beneficial owner, even when it was against his pecuniary interest to do so.

It is certainly not an unusual concept that title to property should be placed in a creditor for purposes of security, and that the debtor should retain the equitable ownership thereof. Cf. *L. D. Wilson*, 26 T.C. No. 56 (1956), wherein the Tax Court held that for purposes of Sec. 117 (k) (2), a partnership was the "owner" of timber which it had a right to cut, subject to reservation of title in the seller for security purposes. The court compared the situation of the partnership with a conditional vendee and with a mortgagor. In this connection, it is worth noting that Eisenhower testified that he considered using a chattel mortgage to accomplish the same purpose as the instrument he

finally adopted, but rejected it because the security was inadequate (R.61).

The Court's finding can be explained on the basis of two misconceptions: First, that the contract was not subject to parol construction, and second; that this case was substantially indistinguishable from the case of *Helga Carlen*, 20 T.C. 573 (1953); aff'd. *Carlen v. Commissioner*, 220 F.2d 338 (9th Cir. 1955). Both of these positions were urged by the district director (R.35, 43, 49), and both were ultimately adopted by the court (R.123-127).

Despite the fact that the court phrased his finding in the alternative (i.e. "If the contract be subject to parol construction . . ."), it seems clear that he was laboring under the misapprehension that he was bound by the designations that the parties adopted for themselves in the contract. His remarks (R.125) to the effect that the contract was not lightly entered into, and was drafted by a person who knew what he was doing demonstrates this. The fact that parties may, for security purposes, carefully draft an instrument in such a way that it gives certain rights in the event of default, however, does not necessarily mean that it accurately defines the interests of the parties for any and all purposes.

This finding and the following one, if taken literally, would require an underlying determination that both Tenzler and Eisenhower, the President and counsel of Northwest, deliberately testified falsely when they stated that the only rights retained by Northwest were for security purposes. Since they were both respectable, disinterested witnesses, whose testimony was unimpeached, it is difficult to believe that this is the conclusion at which the court actually arrived.

The Court will look in vain for any evidence in the record corroborating the trial judge's finding that the document means what it says, insofar as the relationship of Ellison and Northwest and their respective interests in the timber are concerned. The sole factor guiding the trial court in his decision was the instrument—viewed not in context, but in a vacuum.

In the case of *Landa v. Commissioner*, 206 F.2d 431, 432 (D.C. Cir. 1953), the Tax Court had made a statement in its opinion similar to the remarks of the trial judge in this record (R.123-124), saying:

“Whether this evidence was properly admitted might be an interesting question to which, however, we are not now required to give an answer. In the light of the agreement itself, and the circumstances of its execution, we prefer to rely on the contents of a written document rather than to ascribe probative weight to oral testimony contradicting it.”

The Court of Appeals, citing *Helvering v. F. & R. Lazarus & Co.*, 308 U.S. 252, 60 S. Ct. 209, (1939), held this to be error, and pointed out, 206 F.2d 431, 432:

“Moreover, the oral testimony here was not barred by the parol evidence rule, since the Commissioner ‘was not a party or privy of a party to [the] written agreement [s?].’ Nor was it ‘inherently improbable in the light of the circumstances and the situation of the parties as disclosed by other evidence.’ ”

The case was therefore remanded to the Tax Court for consideration of the oral testimony. That court thereupon stated that it had weighed the testimony and rejected it on the ground that “written instruments were ‘more trustworthy than the recollection of a witness giving contradictory oral testimony.’ ” In a divided opinion, the Court of Appeals held that the decision was clearly erroneous and determined that the taxpayer was entitled to the benefit of the facts relating to the substance of the transaction, despite the form it had taken. *Landa v. Commissioner*, 211 F.2d 46 (D.C. Cir. 1954).

A long list of cases holding that parol evidence is admissible as against a stranger to the contract is set forth in *Haverty Realty & Investment Co.*, 3 T.C. 161, 167 (1944), including three from this Circuit. This list, together with another case, were cited with approval

in the first *Landa* decision. It is eminently clear that both the district director and the court below were wrong in their insistence that the contract spoke for itself.

Parol evidence was not only admissible as between the parties to this litigation, but Washington law establishes that even between the parties to the instrument, evidence of the circumstances surrounding its execution is admissible in determining whether the intent of the parties to a document be that it is for security purposes. *Pittwood v. Spokane Savings & Loan Society*, 141 Wash. 229, 251 Pac. 283 (1926). It is, of course, almost axiomatic that the nature of the property interests to which the tax applies is determined by the rights of the parties under state law. *Ward v. Commissioner*, 224 F.2d 547, 551 (9th Cir. 1955).

The court did purport to consider the oral evidence, of course, both in his oral opinion from the bench (R.123-127) and his subsequently entered findings (R.23). That oral opinion shows that his conception of the effect of the contract made it impossible for him to give the testimony appropriate weight. Such language as "I can't see how we can possibly get away from the terms of this contract," (R.124), and "Under no conceivable situation under this contract did this timber

ever come under the ownership of Ellison" (R.124), as well as that portion of the opinion relating to the Court's interpretation of the contract (R.125-126), shows unmistakably that the Court did not consider the contract between Northwest and Ellison in relation to the entire transaction but restricted its determination of the property rights of Ellison to the written instrument alone without regard to the testimony or evidence of the witnesses in this case.

The Court's opinion, if it be not a determination that the written instrument and only that written instrument defined and determined the rights and interests of the parties is impossible of reconciliation with the Court's granting any weight or credibility to the testimony of the witnesses. The relationship of the instrument to the entire transaction and its purpose as a security device was fully explained by the uncontradicted testimony of the President and the Secretary of Northwest.

Tenzler, President of Northwest, stated:

"Rights that we retained were to protect our interests, the money we may have advanced, and to see to it that there was a proper performance, [of the] contract on which the company may be involved and the right to purchase the logs from the logger at prevailing market prices or to have the first privilege of purchasing the logs at prevailing market prices." (R.38-39).

He testified that this policy was followed in the Green Forks transaction. (R.39,43).

Eisenhower also testified that the purpose of the contract was a security device; he stated:

“I had instruction from our conference [27] to draft such instrument as I thought would safeguard Northwest Door in the advances which it was making to Mr. Ellison, and secondly, to see that Mr. Ellison delivered to Northwest Door the logs which Northwest Door wanted to use in its plywood plant. *Those were my instructions. And this was before the bid date. After the bid date I was told that Vancouver Plywood Company had joined with Northwest Door in the purchase of that timber for Mr. Ellison* and I then re-drafted the instrument to include Vancouver Plywood as a part of the parties of the first part who were going to advance the necessary funds needed by him to purchase this timber and log it. That was my purpose.” (R.56). (Emphasis supplied.)

There is certainly nothing in the record from which it can reasonably be determined that the Court either should or intended to brand every witness before him as a prevaricator. In view of the Court’s statement in its oral opinion regarding the contract, (R.124, 125), it is apparent that the Court did not disbelieve the testimony, but simply concluded that it was of no legal effect to “vary the terms of the instrument,” and hence, like the Tax Court in the first *Landa* case, ascribed no

weight to it. This was error. The testimony of the various witnesses should have been considered. In fact, consistent as it is with the function of the instrument and the circumstances of the case, and being uncontradicted and unimpeached, it is conclusive. It establishes the fact that Ellison was the beneficial owner of the timber and logs herein. *Landa v. Commissioner*, 206 F.2d 431 (D.C. Cir. 1953); 211 F.2d 46 (D.C. Cir. 1954).

II

The evidence compels the conclusion of law that Ellison was the equitable owner of the contract right to cut the timber and had harvested and sold it in the course of his business.

We submit that it has been established by the undisputed facts that Ellison was the equitable, beneficial owner of the contract right to cut granted by the Forest Service contract, Exhibit 2, and that this court may so find. *McGah v. Commissioner*, 210 F.2d 769 (9th Cir. 1954), Rule 52 (a), Federal Rules of Civil Procedure.

Nor is it an original idea that in tax matters form will not prevail over substance and the names given by parties to the transactions and documents entered

into by them, while of some value, will not be permitted to control the true nature of the operative facts.

As stated in *Hamme v. Commissioner*, 209 F.2d 29, 32 (4th Cir. 1953):

“It is well established, however, that the name used by the parties in describing a contract and payments thereunder, do not necessarily determine the tax consequences of their acts. * * * In the field of taxation we must be controlled by the substance and reality of a transaction rather than by the formal attributes of written documents. * * *”

Moreover, this rule is not a one-way street which operates only in favor of the taxing authorities. “The taxpayer as well as the Commissioner of Internal Revenue is entitled to the benefit of this rule.” *Landa v. Commissioner*, 206 F.2d 431, 432 (D.C. Cir. 1953); *Landa v. Commissioner*, 211 F.2d 46, 50 (D.C. Cir. 1954); See also *Edward Peterson Company v. O'Malley*, 216 F.2d 98 (8th Cir. 1954).

A recent decision in this Circuit, *Hatch's Estate v. Commissioner*, 198 F.2d 26 (9th Cir. 1952), illustrates the operation of the rule, and particularly the fact that documents must be viewed in their context as an integral part of a whole, rather than abstracted entirely from their background (198 F.2d at p. 29). This Court there stated the applicable rule as follows:

“ * * * in dealing with a tax matter we must be guided by the substance and effect of what was done. *United States v. Phellis*, 1921, 257 U.S. 156, 168, 42 S. Ct. 63, 66 L. Ed. 180. This is not to say that we are to disregard the language used in a contract which may be involved, or the methods used to effect the transaction. But rather, *we must consider the form and steps used in their relation to the intended and accomplished entire transaction. Halliburton v. C.I.R.*, 1935, 9 Cir., 78 F2d 265. As the old homely saying has it, ‘The tail must not wag the dog.’ ” (Emphasis supplied).

In that case, too, the rule was applied in favor of the taxpayer, and the Tax Court’s finding of fact was reversed as “clearly erroneous.”

A decision of the Supreme Court is worthy of consideration because of elements of similarity to the present situation. In *Helvering v. F. & R. Lazarus & Co.*, 308 U.S. 252, 60 S. Ct. 209, 210 (1939), the taxpayer was attempting to claim depreciation on a store, legal title to which it had “purported to convey.” The courts below found that the conveyance was for security purposes, and held that the taxpayer “owned” the building for purposes of claiming depreciation. The Supreme Court affirmed, stating:

“General recognition has been given the ‘established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money.’ In the

field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding.”

It perhaps need hardly be added that the courts of Washington recognize the doctrine that a deed absolute on its face may be in reality a mortgage. *Beadle v. Barta*, 13 Wash. 2d 67, 123 Pac.2d 761 (1942). It is also the law of Washington that in determining the character of the transaction, it is the intention of the parties that controls, and that all surrounding circumstances may properly be inquired into to get at the real nature of the instrument. *Pittwood v. Spokane Savings & Loan Society*, *supra*.

This is, of course, not precisely the same situation that we are faced with in the instant case, because here Ellison never had legal title to the timber or the logs. In that respect, this case was more like a conditional sale or a trust receipt than a mortgage. But it is not necessary to pin down the nature of the instrument, so long as it is established—as it was in this case—that the sole function of the document was to provide security. That being established, it follows that Ellison was the beneficial owner. Again, compare the case of *L. D. Wilson*, 26 T.C. No. 56 (1956), wherein the partnership never owned legal title to the timber and the logs, but

the court nevertheless held it to be the "owner" for the purposes of the second subsection of Section 117 (k).

Taken all together, therefore, the evidence establishes the fact that it was the intent of the parties, in entering into the contract designated as Exhibit 3, that it would not define the status and relationship of Ellison and Northwest with respect to beneficial ownership of the timber. It was a security device, designed to insure that Ellison delivered the logs to no one but Northwest so that the latter would obtain the supply of logs it needed, and would be repaid its advances from the proceeds thereof. Northwest considered this a log purchase, rather than a service contract, and handled it on its books as such. The language of the document, as described by Eisenhower's testimony, was drawn with security in mind, and nothing more.

III

The benefits of Sec. 117 (k), I.R.C. 1939, are available to Ellison, as equitable owner of the contract right to cut the timber, even though naked legal title was held by another.

In considering this case, it is to be noted that a somewhat similar case involving Section 117 (k) (1), I.R.C. 1939, is, *Helga Carlen*, 20 T.C. 573 (1953); *aff'd. Carlen v. Commissioner*, 220 F.2d 338 (9th Cir. 1955).

The *Carlen* case holds that the taxpayers, although having a contract right to cut the timber, did not have a proprietary interest or the right to sell the logs on their own account, and hence did not qualify under the statute.

In the instant case, the contract between Northwest and the Forest Service, (Ex.2, p.4, Clause 6) provides:

“Section 6. * * * The title to all timber included in this agreement shall remain in the United States until it has been paid for, felled and scaled, measured, or counted.”

The evidence establishes an assignment of the Forest Service contract from Northwest to Ellison and, that by agreement of the parties, Ellison was the equitable owner of and had a contract right to cut the timber, the evidence further establishes that Ellison was treated as the owner of the contract and the equitable owner of the timber by Northwest and the Forest Service, even though no written assignment of the contract between Northwest and the Forest Service appeared on the latter's record.

The remaining issue is whether the cutting of the timber by Ellison was, within the meaning of the statute, for sale, or for use in his trade or business. This

issue is further narrowed by the fact that Ellison's business was, as the Court found (R.25), the cutting and marketing of timber, and hence the use made by Ellison of the cut timber in his trade or business was a sale thereof. If there were no evidence in this case other than Exhibits 2, and 3, the similarity between this and the *Carlen* case would perhaps be sufficient to justify the court in following *Carlen*. The misapprehension of the court was that the *Carlen* case was indistinguishable from this one. This was the position taken by the district director at the start of the case (R.35), the conclusion announced by the court in his oral opinion from the bench (R.123), and was embodied in his Conclusions of Law (R.25). This statement is comprehensible only if the documents accurately and completely defined and stated the relationship between Ellison, Northwest and the Forest Service for all purposes. All of the testimony and other documentary evidence in this case refute that conclusion.

The basic distinction is that in the *Carlen* case the contract reserving title accurately defined the status of the parties. The Tax Court stated (20 T.C. at p. 578) that the taxpayers therein argued that the reservation of title was for security only, but there does not appear to have been any evidence whatsoever that this was the case, other than the method of payment based upon

market price. In the instant case, there was uncontradicted testimony, both by the President of Northwest and by its Secretary and Counsel (Eisenhower), who drafted the contract, that its purpose was solely for security. This in itself is sufficient to distinguish the cases, and all of the evidence corroborates this testimony.

In this case, Ellison dealt directly with the Forest Service in such substantive matters as relocating roads and exchanging timber. There was no such evidence in *Carlen*. Ellison's business included marketing logs. Carlen's business was stipulated to be "logging timber." The intent of the parties was never set forth in *Carlen*; here, it was established not only by direct testimony, but by the fact that Northwest treated the logs as Ellison's on its books, permitted him to deal directly with the Forest Service, and did not claim capital gains treatment, that Northwest as well as Ellison intended Ellison to be the real party in interest.

In the instant case there was evidence that Northwest treated logs which Ellison had purchased in his own name in the same manner as the logs delivered under this contract; there was no such circumstance in *Carlen*. In *Carlen*, the logger was required by his contract to operate at least forty-eight hours per week; here Ellison had complete discretion. The scaler was to be

either an agency set forth in the contract or one that the parties could agree upon, whereas in *Carlen*, the scaler was to be selected by the mill.

In the instant case, the timber was purchased by Northwest at the instance of Ellison, with the intention that he would log it, whereas in the *Carlen* case, the timber had been purchased before the logging partnership had even been formed.

Assuming, therefore, that Ellison had the beneficial interest in this timber, the question remains whether he is entitled to claim capital gains treatment under Sec. 117 (k) (1). Both the decisions of the Tax Court and of this Court in *Carlen* seem to be implicit with the assumption that such is the case. Thus, the Tax Court found it necessary expressly to reject the contention of the taxpayer therein that title was reserved for security.

Ellison was not the owner of the timber in the sense of strict legal title, although the case of *L. D. Wilson*, 26 T.C. No. 56 (1956), previously cited, supports the proposition that he was the "owner" for purposes of Sec. 117 (k) (2), which presumably is to be interpreted *in pari materia* with Sec. 117 (k) (1). In any event, he did have a contract right to cut the timber. Whether or not he cut it for sale or for use in his

trade or business, depends, in the language of the *Carlen* decision (220 F.2d 338, at p. 340, quoting with approval from 20 T.C. at p. 578) upon whether Ellison had a "proprietary interest which he can dispose of by sale."

If by "proprietary interest" were meant mere naked legal title, the Court could very easily have said so. In the instant case, the evidence supports a finding that Ellison had every proprietary interest except naked legal title, which was retained in the Forest Service or Northwest for the purposes of security. Within the meaning of the statute, as interpreted by the *Carlen* decisions, it is appellant's contention that he did have a proprietary interest, and that he was entitled to the benefit of his election to take capital gains treatment on the transaction. The court below relied entirely on the one document, Exhibit 3, which document was designed for a specific purpose, to determine all of the rights and duties of the parties thereto for all purposes.

In view of Ellison's Request for Admission, pars. 8 through 11 inclusive (R.8,9), and the tax collector's Reply to Request for Admissions, par. 6 (R.11), and par. 14 of the Findings of Fact (R.25) there is no dispute that Ellison held his right to cut the timber for the required period, and that he did cut it for sale in his

business, which was producing, transporting, and marketing logs.

It is our contention, based upon the uncontradicted, unambiguous evidence of disinterested and unimpeached witnesses, consistent with the circumstances of the case and the purpose of the document, that Ellison was at all times the equitable owner of the timber contained on the Green Forks Tract and that he owned the contract right to cut, and did cut that timber for use in his trade or business. The judgment of the District Court should be reversed, or in the alternative, the case should be remanded for new trial with instructions that the oral evidence be considered and appropriately weighed.

SUMMARY

The judgment should be reversed for error in failing to consider relevant evidence, because the findings and conclusions upon which the judgment appealed from are based can be sustained only if it can be affirmatively said that the rights of Ellison are to be determined solely by the contract.

Respectfully submitted,

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APPENDIX

Section 117 (j) of the Internal Revenue Code states in part:

“(j) Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.

“(1) Definition of Property Used in the Trade Business—For the purposes of this subsection, the term ‘property used in the trade or business’ * * * includes timber with respect to which subsection (k) (1) or (2) is applicable.”

Section 117 (k) (1) provides:

“(k) Gain or Loss upon the cutting of timber—

“(1) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer’s trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. In case such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the adjusted basis for depletion of such timber in the hands of the taxpayer and the fair market value of such timber. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election

under this paragraph such election shall apply with respect to all timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding upon the taxpayer for the taxable year for which the election is made and for all subsequent years, unless the Commissioner, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this paragraph except with the consent of the Commissioner."

Section 117 (k) (2) provides:

"(2) In the case of the disposal of timber (held for more than six months prior to such disposal) by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber, the difference between the amount received for such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber."

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF FOR THE APPELLEE

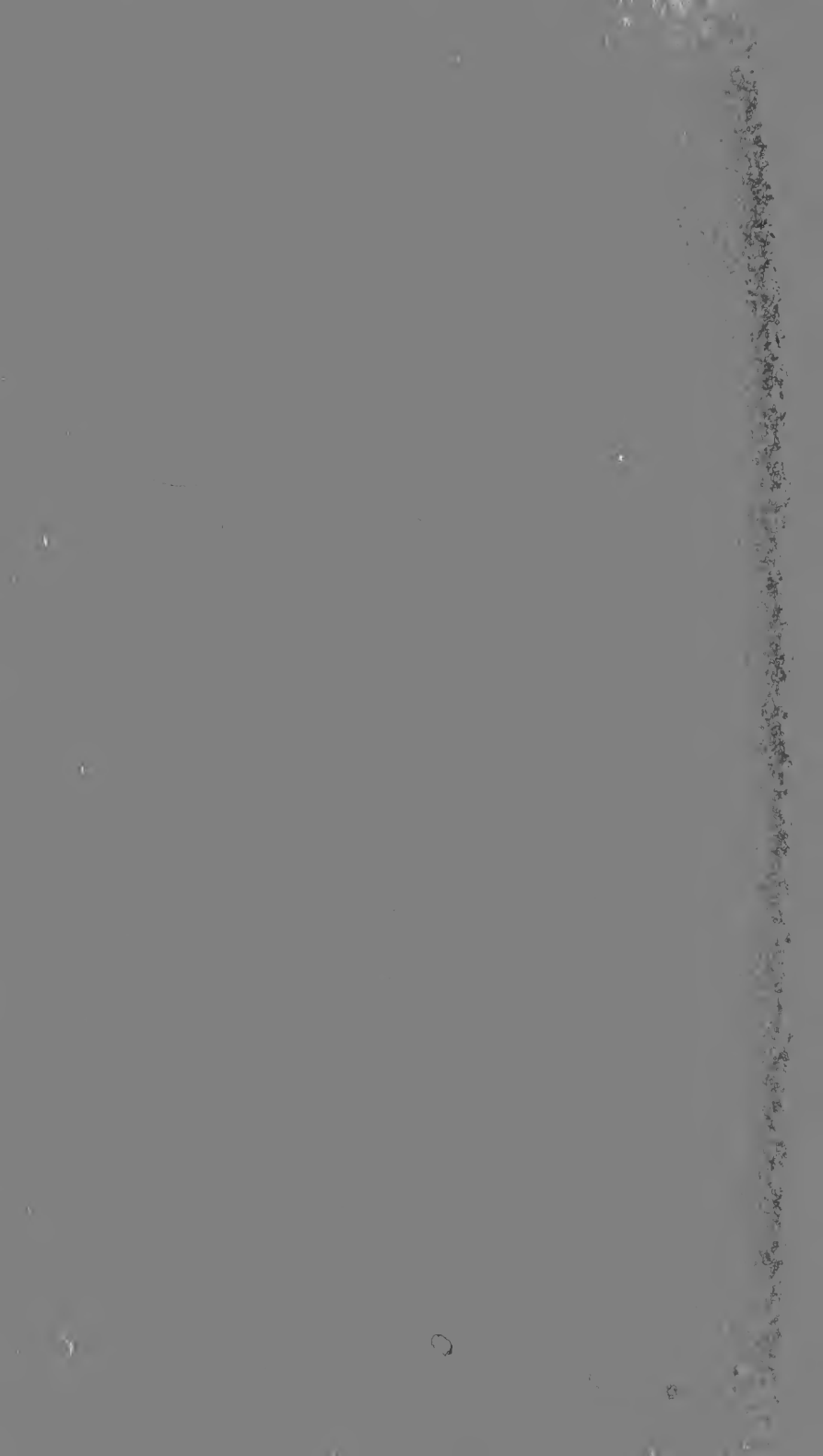
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OPINION BELOW

The findings of fact and conclusions of law of
the District Court (R. 20-26) are not reported.

JURISDICTION

This appeal involves federal income taxes for the
tax year 1949. (R. 20.) On February 16, 1953, the

District Director of Internal Revenue for the District of Washington notified taxpayers of a proposed tax deficiency for 1949. (R. 4.) The District Director, in December, 1953, assessed a deficiency of \$11,839.10 which, together with interest of \$2,661.04, was paid by taxpayers on December 10, 1953. (R. 14-15.) On February 24, 1954, taxpayers filed a claim for refund. (R. 4.) After the expiration of six months, without acceptance or rejection of the claim by the District Director, suit was commenced by taxpayers on September 2, 1954, in the United States District Court for the Western District of Washington, Southern Division, for refund of the taxes allegedly wrongfully collected. (R. 4-5.) Jurisdiction of the District Court exists under 28 U.S.C. Section 1340. Judgment was entered in favor of the District Director on June 22, 1956. (R. 26-27.) Within sixty days, and on August 18, 1956, notice of appeal to this Court was timely filed by taxpayers. (R. 27-28.) This Court has jurisdiction under 28 U.S.C. Section 1291.

QUESTION PRESENTED

Whether the District Court erred in finding that taxpayer Robert F. Ellison did not own, or have a contract right to cut for sale or use in his business, certain tracts of standing timber so as to entitle him to capital gains treatment under Section 117(k) of

the Internal Revenue Code of 1939 on the income he earned therefrom in the course of his logging operations in 1949.

STATUTE AND RULE INVOLVED

The pertinent provisions of the statute and rule involved are set forth in the Appendix, *infra*.

STATEMENT

The facts of this case are taken from the District Court's findings of fact (R. 20-25), the transcript of testimony (R. 36-122), and exhibits introduced into evidence, some of which are printed in the record (R. 127-137), and the remainder of which are before the court by stipulation (R. 139).

The taxpayers at all times material hereto were husband and wife residing in the State of Washington. As such they filed their joint income tax return for the year 1949 with the Collector of Internal Revenue for the District of Washington. (R. 20.) Taxpayer Cleo A. (Ellison) Walker is a party solely because of the joint return feature, and references hereinafter to "taxpayer" are applicable only to Robert F. Ellison.

On his 1949 tax return Ellison reported the profit of \$50,380.06 from timber operations as capital gains

on the theory that he owned and sold certain timber (described in Exhibits 2 and 3) within the meaning of Section 117(k) of the Internal Revenue Code of 1939. (R. 13, 15-16.) The Commissioner disallowed the capital gains treatment on the ground that taxpayer did not own the timber or have the right to cut it for sale or use in his business within the meaning of Section 117(k). (R. 16-17.) Treating the profit as ordinary income, the Commissioner assessed a deficiency in income tax of \$11,839.10, which, together with interest of \$2,661.04, was paid by taxpayer. (R. 14-15.) A claim for refund was filed, and more than six months having elapsed, taxpayer brought suit for refund. (R. 3-5.) The following facts were elicited at the trial:

In 1947 the United States, through the Forest Service of the Department of Agriculture, owned the fee to certain timber lands on the Green Forks River in the State of Washington. The Forest Service was then in the process of offering to sell the timber on said tract to the public under a pay-as-cut contract. (R. 21.)

Theodore Franklin Wall was employed by the Northwest Door Company (hereinafter called Northwest Door) in January, 1947, to acquire timber for Northwest Door, and to operate the Wall Boom (a distribution and storage point for the local logging indus-

try) which he had previously owned and which he sold to Northwest Door in 1946. (R. 79-81, 86.) Prior to Wall's employment with Northwest Door he had investigated the Green Forks area from the viewpoint of his own lumber business. (R. 85-86.) Taxpayer, a logger, accompanied Wall on at least two trips to see if logging operations could be conducted profitably (R. 82-83), but it is not clear whether the trips were before or after Wall was employed by Northwest Door (Compare R. 82-83 with R. 85).

As part of his duty of acquiring timber for Northwest Door, Wall investigated the Green Forks area as one of his first projects and recommended it to Northwest Door. (R. 82, 86.) Wall testified that Ellison was looking for a logging operation, that they discussed Ellison's acquiring the timber and logging it and decided that the operation was too big for Ellison. He would have to have financing to log the area. (R. 82-83.) Wall stated that he knew Ellison to be in the logging business. (R. 86.) In defining what a logger does, Wall conceded that "There are about as many different kinds of deals for logging as there are deals," and that "the logger is the fellow who in one manner or another, on one kind of a deal or another, brings the logs out." (R. 87-88.)

The Forest Service awarded portions of the Green Forks timber, and the contract right to cut the timber, to Northwest Door by contract Form 202, executed September 4, 1947. (Ex. 2.) This contract (hereinafter sometimes called the timber contract) by its terms provided that Northwest Door would purchase, cut and pay for the timber. (R. 22.) No timber was to be cut until paid for, and title to the timber remained in the United States until it had been paid for, felled and scaled, measured, or counted. (Ex. 2, Secs. 6, 11.) Thereafter title passed to Northwest Door which was financially liable to the United States for performance of the contract. (R. 22.) The purchase price for stumpage varied according to the types of timber. (Ex. 2, Sec. 2.)

Northwest Door agreed to have at least twelve men and supervisory personnel available to the Forest Officer in charge for the burning of slash¹ at the direction of such officer. (Ex. 2, Sec. 15.) In addition, many other safeguards were inserted in the contract for the protection of the National Forest, which by their nature were to be regulated and supervised by the Forest Officer in charge by direct contact with

¹ Slash, as used in the contract, was defined as "all debris resulting from logging operations or from construction of roads or other improvements." (Ex. 2, Sec. 15b.)

Northwest Door's representative at the site of the logging operations. (See Ex. 2, Secs. 15a, 17, 18, 19, 20, 24, 27.) The contract expressly specified that Northwest Door "shall have at the main camp * * * a representative who shall be authorized to receive on behalf of the purchaser, any or all notices and instructions in regard to work under this agreement given by the Forest Officer in charge, and to take such action thereon as is required by the terms of this agreement." (Ex. 2, Sec. 35.)

It was also provided that the contract could not be transferred or assigned unless the transferee or assignee was acceptable to the United States and unless the transfer or assignment was approved in writing by the appropriate Forest Officer. (Ex. 2, Sec. 33.) And it was agreed that "The conditions of the sale are completely set forth in this agreement, and none of its terms can be varied or modified except in writing by the" appropriate Forest Officer. (Ex. 2, Sec. 41.)

Unless changed in writing by the Regional Forester, at least 10,000,000 feet B.M. was to be cut prior to December 31, 1948, and at least 20,000,000 feet B.M. prior to December 31, 1949. (Ex. 2, Sec. 3.) By letter dated December 23, 1948, to "Northwest Door Company," the Regional Forester approved a reduction of the volume required to be cut prior to December

31, 1948, from 10,000,000 to 4,000,000 feet B.M. (See letter attached to Ex. 2.)

An additional application for modification of the September 4, 1947, contract was submitted by "Northwest Door Company" on February 2, 1950, and after consent of the Aetna Casualty & Surety Company, which had undertaken the original guarantee of performance of Northwest Door (see Bond dated September 4, 1947, attached to Ex. 2), the application was approved by the Acting Regional Forester on February 17, 1950. (See Application for Modification of Agreement, and Consent of Surety, attached to Ex. 2.)

The record shows that Northwest Door corresponded with the Forest Service throughout the duration of the contract as the purchaser and owner of the Green Forks timber. (See Ex. A.) The records of the Timber Management Office of the Forest Service indicate that Northwest Door was the owner and holder of the Green Forks timber contract, and that there was no recorded assignment of any kind of that right. Ellison is not mentioned in those records in any way as having any right or interest in the timber contract. (R. 120-121.)

Northwest Door was in the business of manufacturing plywood, fir plywood, and fir doors. In 1947

most of its logs were procured in the open market. (R. 37.) Mr. Tenzler, the President of Northwest Door from 1947 to the time of this action, testified that Northwest Door's object in entering into the contract with the Forest Service was to assure itself of a supply of logs for use in the business. (R. 46.) When asked whether any other person, firm or corporation other than Northwest Door owned any interest in the Green Forks timber, he answered that the Vancouver Plywood Company owned an interest.² (R. 44.)

Northwest Door was not interested in making a profit from the logging operations. (R. 22.) A contract (hereinafter sometimes called the logging contract) was entered into with Ellison on December 9, 1947, in which he was designated as the "Logger". (Ex. 3, R. 127-133.) Northwest Door agreed to pay him, "for his services in logging and delivering said timber," the Columbia River market price for the logs as determined on the day of scaling, less the amount

² At one point Vancouver Plywood Company was a party to the transaction (R. 47, 56) and appears as one of the parties of the first part in the contract entered into with Ellison as party of the second part. (See Ex. 3, R. 127-128.) It was stipulated, however, that Vancouver Plywood Company withdrew before any harvesting of timber. (R. 65-66.) For purposes of this appeal Vancouver Plywood's participation is immaterial and may be disregarded. (See footnote in taxpayer's brief, p. 14.)

which Northwest Door was required to pay the Forest Service as stumpage and other costs as might be imposed on Northwest Door under the timber contract with the Forest Service. (Ex. 3, Sec. 6, R. 130.)

By the express terms of the logging contract it was agreed that the logs, timber, and forest products shall remain the property of Northwest Door, and that Ellison "shall not have any right, title or interest therein other than the right to receive his compensation herein agreed to be paid." (Ex. 3, Sec. 5, R. 130.)

Ellison agreed to cut, fall, buck, yard, load and transport to navigable water at his expense all the timber described in the Green Forks timber contract, and at his own expense to construct and maintain all roads necessary for the removal of the timber. (Ex. 3, Secs. 1, 2, 3, R. 128-129.) He agreed to perform in accordance with the terms, conditions and specifications set out in the Green Forks timber contract and under the Direction of the Supervisor of Forest Service, and undertook Northwest Door's obligations in this respect, agreeing to perform "said logging services" in a good and workmanlike manner, and to pay all industrial insurance premiums and other taxes or assessments levied by any government. (Ex. 3, Secs. 3, 4, R. 129-130.) The cost of the surety bond was charged to Ellison. (R. 70.)

It was further agreed that Northwest Door would advance reasonable sums of money to Ellison for road construction, that the amount so advanced would be repaid by Ellison, and that Northwest Door might recoup such advances by regularly deducting amounts from the payments due Ellison under the contract. (Ex. 3, Secs. 8, R. 131-132.)

The logging contract between Northwest Door and Ellison was drafted by Edgar N. Eisenhower who was a director, secretary, and counsel for Northwest Door. (R. 48, 56.) Mr. Eisenhower testified that Northwest Door was interested in having the logs in the Green Forks area for its plywood plant. (R. 52.) Eisenhower stated that a discussion was held "to determine how much money was going to be required to build his roads and other things" and how Northwest Door was to be secured in its two primary objectives, first, the return of its money, and secondly, the acquisition of the logs. (R. 52.) At another point Eisenhower repeated that "I had instructions from our conference to draft such instrument as I thought would safeguard Northwest Door in the advances which it was making to Mr. Ellison, and secondly, to see that Mr. Ellison delivered to Northwest Door the logs which Northwest Door wanted to use in its plywood plant." (R. 56.)

Mr. Eisenhower stated that he discussed with Mr. Tenzler on more than one occasion the objectives to be reached in drafting the contract. In answer to the question whether he incorporated into the contract the objectives which he and Mr. Tenzler intended to accomplish (R. 58-60), he answered (R. 60):

A. * * * I think I did; I think I did. It was carried out.

Q. And you chose language which you considered to be appropriate for your objective, isn't that true?

A. Certainly, those are my words.

Mr. Eisenhower testified further that he explored every possibility for securing the advances which Northwest Door was going to extend to Ellison, including taking a mortgage on Ellison's equipment. He determined that there was not enough security to justify a mortgage, and he finally decided on the contract actually used. (R. 61.)

Under the terms of the logging contract \$100,000 was advanced to Ellison; \$50,000 on March 16, 1948, and \$50,000 on August 2, 1948. (R. 70.) This money was advanced for road building, to meet bills, to buy an occasional piece of equipment, to pay for a security bond, and for certain incidental expenses. (R. 90.) The money was repaid according to the formula established in the logging contract, *i.e.*, Northwest Door

deducted amounts from the remittances to Ellison sufficient to recoup the advances. (R. 70.) Remittances to Ellison were charged to Northwest Door's log purchase account. (R. 70.)

There is no evidence that the amounts Northwest Door had to pay for the timber for stumpage in advance of cutting were considered by the parties as a loan to Ellison, nor is there any evidence that he was obligated to repay such amounts irrespective of future events. When asked whether he put any money into the operation in addition to the \$100,000 borrowed from Northwest Door, Ellison answered that he put in an additional \$75,000, some of which was his own, the rest of which he was able to raise elsewhere. (R. 110.) He did not state that he considered the amount paid by Northwest Door for stumpage as an advance to him or as part of his investment.

Roy L. Ausserer, the manager of Northwest Door's log and lumber department, testified that Northwest Door owned stands of timber other than the Green Forks timber. (R. 73.) He stated that there were many ways of financing loggers, that Northwest Door sometimes owned the timber outright and paid the logger "a service charge" of a flat sum for bringing the logs out regardless of market fluctuation. (R. 74, 77.)

With respect to the timber contract, Mr. Ausserer, on October 18, 1951, wrote the Forest Service on Northwest Door's letterhead. He referred therein to Ellison as the "contract logger" for Northwest Door. (R. 103; Ex. A.) Mr. Ellison defined "contract logging" as removing someone else's logs from the woods for a certain price. (R. 105.)

The District Court found (R. 23) that the logging contract—

was drafted after a full exploration of the situation by all concerned, and reflected the intentions of the parties precisely. Its provisions are clear and unambiguous. If the contract be subject to parol construction, then the evidence fully shows that the contract meant what it said.

The court, therefore, held that (R. 23-24, 25):

Ellison had no right, title or interest in the timber at any time. He was to perform the service of logging the timber for Northwest Door Company and was to be paid for his services only.
* * *

* * * *

* * * The Commissioner correctly determined that the gain from Ellison's logging operations was taxable to the taxpayers as ordinary income. * * *

SUMMARY OF ARGUMENT

Whether the taxpayer is entitled under Section 117(k) to capital gains treatment on the profits from

his logging operations in 1949 depends on whether he was the owner of the Green Forks timber. This is primarily a question of fact and the District Court's finding that taxpayer "had no right, title or interest in the timber at any time" should be affirmed unless "clearly erroneous."

There can be no question, in fact taxpayer concedes, that by the express and unambiguous terms of the logging contract he was to be paid for his "services," and ownership of the timber was to remain at all times with Northwest Door. As in *Carlen v. Commissioner*, 220 F. 2d 338 (C.A. 9th), the fact that the value of his services was measured by the market price, less stumpage, of the logs did not serve to locate ownership of the timber in taxpayer; Northwest Door agreed to this measure of services since it was not itself interested in a profit on the logging operations, but was concerned only with having a supply of logs.

It may be assumed that equitable ownership will satisfy Section 117(k), for the record shows that taxpayer held neither legal nor equitable title. While it may be that parol evidence was admissible in an attempt to impeach the clear meaning of the logging contract, the burden was on taxpayer to prove beyond question his claim that the contract was intended to place mere legal title in Northwest Door as a security device,

while real equitable ownership passed to him. Far from contradicting the terms of the logging contract, the parol evidence is entirely consistent with it and shows conclusively that the contract accurately described Northwest Door as the “owner” of the timber, and taxpayer as the “logger”, for which he was “compensated” for his “services.” The evidence more than substantiates the finding of the District Court, made after a full consideration of the parol evidence, that taxpayer held no right, title or interest in the timber at any time.

ARGUMENT

THE TAXPAYER WAS NOT ENTITLED TO THE CAPITAL GAINS BENEFITS OF SECTION 117(k) OF THE CODE SINCE HE NEITHER OWNED THE GREEN FORKS TIMBER NOR HAD THE CONTRACT RIGHT TO CUT IT FOR SALE OR FOR USE IN HIS TRADE OR BUSINESS

Under Section 117(j)(1) of the Internal Revenue Code of 1939³ (Appendix, *infra*) the term “property used in the trade or business” (afforded capital gains treatment under Section 117(j)(2) of the Code) includes “timber with respect to which subsection (k)(1)

³ All references herein to the Code are to the Internal Revenue Code of 1939.

or (2) is applicable." The ultimate question in this case is whether the taxpayer is entitled to the benefits of the capital gains provisions of Section 117(k) of the Code (Appendix, *infra*), or whether his income in 1949 from the Green Forks logging operation is taxable as ordinary income under Code Section 22(a).

Section 117(k)(1) permits a taxpayer to elect on his return to have the cutting of timber for sale or for use in his business considered as a sale or exchange for capital gains purposes. The taxpayer must be one "who owns, or has a contract right to cut" the timber. If he has owned the timber or has held the contract right for the requisite period (six months prior to the beginning of the taxable year), gain is then recognized "in an amount equal to the difference between the adjusted basis for depletion of such timber in the hands of the taxpayer and the fair market value of such timber."

While the expression "contract right to cut" is not defined in the Code, it is perfectly clear from the language used in Section 117(k)(1) in its entirety that the taxpayer who desires to make the election under the statute must have a proprietary interest in the timber other than the mere interest of a contractor for compensation for work or services performed. It seems inescapable from the choice of the words "for sale or

for use in the taxpayer's trade or business" that the statute contemplates that the taxpayer must have such an interest in the timber as would enable him to exercise free disposition of it. It was so held by this Court in *Carlen v. Commissioner*, 220 F. 2d 338. And taxpayer concedes that he must show that he held a proprietary interest, *i.e.*, that he owned the timber. (Br. 34-35.)

Subsection (2) of Section 117(k) likewise requires for its applicability that the taxpayer be the owner of the timber.

This case, therefore, will turn on the resolution of the question whether taxpayer was the owner of the Green Forks timber. This is primarily a question of fact, and the District Court's finding (R. 23) that "Ellison had no right, title or interest in the timber at any time" should be affirmed unless "clearly erroneous." Federal Rules of Civil Procedure, Rule 52 (Appendix, *infra*); *United States v. Yellow Cab Co.*, 338 U.S. 338; *United States v. Real Estate Boards*, 339 U.S. 485.

Northwest Door was in the business of manufacturing plywood, fir plywood, and fir doors. (R. 37.) It entered into a contract with the Forest Service of the United States Department of Agriculture, dated September 4, 1947, whereby it purchased from the

United States certain tracts of standing timber in the Green Forks area. (Ex. 2.) Under this "Timber Sale Agreement" title remained in the Forest Service until the timber had been paid for, felled and scaled, measured or counted. (Ex. 2, Secs. 6, 11.) Thereafter, by the terms of the agreement, title passed to Northwest Door. (R. 22.) The primary reason why Northwest Door entered into this contract was to assure itself a supply of logs for use in its business. (R. 46, 52, 56.)

On December 9, 1947, Northwest Door entered into a contract with taxpayer Ellison, concerning the Green Forks timber, whereby the former was designated the "Owner" and the taxpayer was referred to as the "Logger." (Ex. 3, R. 127-133.) Taxpayer's duties under this logging contract were to cut, fall, buck, yard, load and transport to navigable water all the timber described in the Green Forks timber contract. (R. 128-129.) Northwest Door agreed to pay him, "for his services in logging and delivering said timber", the market price less the stumpage and other costs as imposed under the timber contract with the Forest Service. (R. 130.) The logging contract explicitly specified that the logs, timber, and forest products were to remain the property of Northwest Door, and that Ellison "shall not have any right, title or interest therein other than the right to receive his compensation" for his services. (R. 130.)

There can be no question but that the logging contract was designed to obtain taxpayer's services, and that under its terms taxpayer was either an employee or an independent contractor. While he was to be paid the prevailing market price, that did not locate ownership of the timber in him. As in *Carlen v. Commissioner, supra* (where the taxpayer was also paid the market price less stumpage), it was merely the contract measure of the value of his services. The market price was paid taxpayer since Northwest Door was not itself interested in a profit on the logging operations (R. 22), but was concerned only with having a supply of logs. (R. 46.)

Taxpayer concedes (Br. 32) that the logging contract standing alone, unimpeached, would preclude any claim on his part of ownership of the timber, and that the *Carlen* case would be controlling authority against his position. But he claims that the logging contract represents only the form of the transaction and does not reflect the intent of the parties thereto, and that he successfully showed by parol evidence that the real incidents of economic or equitable ownership were in himself. See *Carlen v. Commissioner, supra*; *Wilson v. Commissioner*, 26 T.C. No. 56.

While it would appear that a taxpayer might under certain circumstances impeach a contract, to

which he himself was a party, as not representing the intent of the parties⁴, it has been recognized that the effect of such a rule places the Government at a decidedly unfair disadvantage. Thus in the family partnership cases the taxpayer may not elect to treat the partnership as sham for tax purposes. The election to either sustain or disregard the effect of a sham partnership is with the Commissioner to exercise as best serves the purposes of the taxing statute. *Higgins v. Smith*, 308 U.S. 473, 477; *Maletis v. United States*, 200 F. 2d 97 (C.A. 9th). The rationale of this rule was persuasively expressed by this Court in *Maletis v. United States*, *supra*, as follows (p. 98):

The Bureau of Internal Revenue, with the tremendous load it carries, must necessarily rely in the vast majority of cases on what the taxpayer asserts to be fact. The burden is on the taxpayer to see to it that the form of business he has created for tax purposes, and has asserted in his returns to be valid, is in fact not a sham or unreal. *If in fact it is unreal, then it is not he but the Commissioner who should have the sole power to sustain or disregard the effect of the fiction since otherwise the opportunities for manipulation of taxes are practically unchecked.* That which best serves the purpose of the tax statute should govern in this field and not the yearly exigencies of

⁴ *Helvering v. Larazus & Co.*, 308 U.S. 252; *Landa v. Commissioner*, 206 F. 2d 431 (C.A. D.C.). See *Hatch's Estate v. Commissioner*, 198 F. 2d 26 (C.A. 9th).

this taxpayer. The general rule has often been stated:

“The taxpayer may not escape the tax consequences of a business arrangement which he made upon the asserted ground that the arrangement was fictional.” *Love v. United States*, 119 Ct. Cl. 384, 96 F. Supp. 919, 921.

While it may possibly be that taxpayer is not estopped from attacking the logging contract as misrepresentative of the intent of the parties⁵, the burden of overturning the clear and unambiguous terms of the contract should at least be very heavy. Taxpayer will certainly have to prove beyond question his claim that the contract was intended as something entirely different from what it purports to be. *Maletis v. United States*, *supra*. Compare *Hatch's Estate v. Commissioner*, 198 F. 2d 26 (C.A. 9th).

Taxpayer contends that either the District Court refused to consider the parol evidence or was unduly influenced by the formal terms of the contract. (Br. 10, 20.) But the record shows that the District Court found, after a full trial, during which all offered evidence was admitted and considered, that “If the [logging] contract be subject to parol construction, then the evidence fully shows that the contract meant what it said.” (R. 23.) And we will show that the parol

⁵ See footnote 4, *supra*.

evidence, far from contradicting the logging contract, shows conclusively that title, whether legal or equitable, never was in taxpayer.

Taxpayer's main thesis is that the logging contract was a security device. (Br. 3-4, 18.) But he has completely misconstrued what it was that Northwest Door was securing. Apparently it is customary for the logger to bear the necessary expenses incident to cutting, felling, loading and transporting the logs to their destination. See *Carlen v. Commissioner, supra*. He must also furnish the equipment. After inspecting the area, taxpayer realized that he did not have sufficient capital to finance the expenses which would fall on him as logger. (R. 82-83.) It was therefore agreed in the logging contract that Northwest Door would advance the money required *for the construction of the road*. (R. 131-132.) During 1948, \$100,000 was loaned taxpayer for road building and other expenses of the operation. (R. 70, 90.) It was the return of this money that Northwest Door was concerned about and which the contract was designed to secure.

The contract was drafted by Edgar N. Eisenhower, counsel for Northwest Door. (R. 48, 56.) He concurred with Mr. Tenzler, president of Northwest Door, that their primary objective in purchasing the timber from the Forest Service was to be assured a

supply of logs for use in the business. (R. 46, 52, 56.) Eisenhower testified that since it would be necessary to loan taxpayer money to build roads and pay certain other expenses, the transaction would have to be handled so as to secure Northwest Door for the return of the loans. (R. 52, 56.) He explored every possibility for securing these loans, including the taking of a mortgage on taxpayer's equipment. He determined that there was not sufficient security to justify a mortgage, and finally decided on the contract actually used. (R. 61.)

Counsel for taxpayer admits that the contract was to secure loans only in the amount of \$100,000 (Br. 8-9), and taxpayer testified to the same effect (R. 110). Concededly this \$100,000 was loaned him for road construction, not as an advance on the purchase price of the timber. It must be kept in mind that taxpayer's case rests on his contention that equitable title was transferred to him, and that the logging contract was designed to keep legal title in Northwest Door to secure the payment of the *purchase price of the timber*. If taxpayer purchased the timber from Northwest Door, a necessary legal consequence would be legal liability on his part to reimburse Northwest Door for the purchase price. In this respect it is fatal to taxpayer's position that there is no evidence in the contract or anywhere else that he borrowed money

from or was obligated to reimburse Northwest Door for the purchase price of the timber. While the market price which Northwest Door was to pay taxpayer was to be reduced by the stumpage (the same as in the *Carlen* case), taxpayer had no personal obligation to reimburse Northwest Door.

Consider the case if a load of logs already paid for by Northwest Door⁶ was never delivered by taxpayer. He would not be entitled to his pay for services, of course, but, if he were the purchaser and owner of the timber he would nevertheless be obligated to pay Northwest Door the purchase price. Since taxpayer had no legal obligation to reimburse Northwest Door for the purchase price, he could not qualify as a purchaser, and the logging contract could not have been intended as security for the payment of such price.

The contract authorized Northwest Door to recoup the advances for road construction by regularly deducting amounts from the payments due taxpayer. This is the only security feature of the entire contract and is obviously what was referred to by Tenzler and

⁶ Contrary to taxpayer's assertion (Br. 16), the Forest Service did not await delivery of logs from taxpayer to Northwest Door before it was paid. The timber contract provided that Northwest Door must pay the purchase price before the timber was cut (Ex. 2, Sec. 11.)

Eisenhower when they spoke of the contract as securing Northwest Door's interest. Eisenhower testified (R. 56) that—

I had instructions from our conference to draft such instrument as I thought would safeguard Northwest Door in the advances which it was making to Mr. Ellison, and secondly, to see that Mr. Ellison delivered to Northwest Door the logs which Northwest Door wanted to use in its plywood plant.

Obviously, the advances Eisenhower spoke of were the advances amounting to \$100,000 for road construction, for these were the only advances extended taxpayer and the only advances for which he was legally liable.

Eisenhower was asked whether he incorporated into the contract the objectives which he and Tenzler intended to accomplish. (R. 58-60.) He answered (R. 60):

A. I think I did; I think I did. It was carried out.

Q. And you chose language which you considered to be appropriate for your objective, isn't that true?

A. Certainly those are my words.

This testimony is clear. The contract means what it says. We will concede that the contract served as a security device as well as a contract for services. However, it was designed to secure Northwest Door, not for the purchase price of the timber, but only for the

repayment of the loans amounting to \$100,000, which taxpayer *was* legally obligated to repay. (R. 131.) The contract, even with the parol explanation, is no proof that equitable title was in the taxpayer. To the contrary, Tenzler testified that aside from Northwest Door and Vancouver Plywood Company⁷ no other person, firm or corporation owned any interest in the Green Forks timber. (R. 44.) Far from contradicting the contract, the parol evidence is entirely consistent with it.

The fact that Northwest Door was primarily concerned with obtaining an adequate supply of logs is inconsistent with a purpose on its part to have transferred ownership to taxpayer. Otherwise in the event of a dispute, taxpayer might have withheld the very supply of logs which Northwest Door needed. On the other hand, by retaining full ownership, Northwest Door was assured of having the logs even if taxpayer breached the contract.

And from taxpayer's viewpoint, how was he ever to prove his claim of ownership in event of a dispute? Under Washington law a conveyance of standing timber is within the statute of frauds. *Groeneveld v. Dean*, 40 Wn. 2d 109, 241 P. 2d 443; *Elmonte Inv. Co. v. Schafer Bros. Logging Co.*, 192 Wash. 1, 72 P. 2d

⁷ See footnote 2, *supra*.

311; *France v. Deep River Logging Co.*, 79 Wash. 336, 140 Pac. 361. Furthermore, the timber contract specified that no transfer or assignment would be valid unless the transferee or assignee was acceptable to the United States and unless the transfer or assignment was approved in writing by the appropriate Forest Office. (Ex. 2, Sec. 33.) Taxpayer concedes, as he must, that there was no written transfer or assignment, although he seems to suggest that the logging contract may be considered a conditional sale contract or trust receipt. (Br. 29.) But clearly the logging contract does not purport to be any such thing. Thus by way of comparison, *Wilson v. Commissioner*, 26 T.C. No. 56, is no support for taxpayer. There the Tax Court held that the taxpayers, as conditional vendees, were the owners for purposes of Section 117(k) (2). But the instrument which transferred ownership to them was intended as and actually was on its face a conditional sale contract. Here, by contrast, there is no document in existence which in fact ever transferred title, or which was ever intended to transfer title, whether legal or equitable, to taxpayer.

As a reasonably prudent business man who was an experienced logger, it would seem that taxpayer would have insisted on some sort of written evidence of his ownership if it were really intended that ownership be transferred to him. There is no suggestion

of any reason for disguising the nature of the transaction. A conditional sale contract, or a conveyance with a mortgage back⁸, could have been utilized with complete protection for Northwest Door (except that of assuring itself a supply of logs which could only be attained by retention of complete ownership), and which would have given taxpayer proof of ownership in the event of a dispute. It is unbelievable that taxpayer would not have insisted on written title if, as he claims, all Northwest Door wanted was security.

Taxpayer relies on the following excerpt from a letter, which Northwest Door was contemplating writing to Vancouver Plywood Company (Ex. 7, R. 135-137), as showing ownership of the timber in himself (Br. 16):

As you know, on the Green Forks timber neither of us will make any gain or loss on the logs, as the contract has been turned over to Ellison. All we will receive are logs at current market prices.

All that Mr. Raknes meant was that inasmuch as taxpayer was receiving market price (less stumpage) for his services, Northwest Door would not make a profit

⁸ Eisenhower considered taking a mortgage, not on the timber as taxpayer suggests, but only on taxpayer's equipment. (R. 61.) The fact that Eisenhower never considered a mortgage on the timber itself supports our position very strongly that ownership of the timber remained with Northwest Door.

on the logging operations. But Northwest Door was not interested in a profit from the logging operations. Being concerned only with having a supply of logs, Northwest Door was content to pay taxpayer the market price, less stumpage, for his services.

The very exhibit from which taxpayer quotes (Ex. 7, R. 135-137) shows that ownership of the timber was in Northwest Door. The subject of the exhibit was a possible trade with Vancouver Plywood. The proposed letter indicates that Northwest Door was considering transferring the Green Forks tracts to Vancouver Plywood. Far from indicating that taxpayer owned the tract, it shows conclusively that as of August 4, 1948, Northwest Door considered itself the owner.

There is further evidence that Northwest Door continued to deal with the Green Forks timber as owner. The timber contract was twice modified by negotiations between Northwest Door and the Forest Service. By letter dated December 23, 1948, to Northwest Door Company, the Regional Forester approved a reduction of the volume required to be cut prior to December 31, 1948, from 10,000,000 to 4,000,000 feet B.M. (see letter attached to Ex. 2.) An additional application for modification of the timber contract was submitted by Northwest Door on February 2,

1950, and after consent of the surety company, which had undertaken the original guarantee of performance by Northwest Door (see bond dated September 4, 1947, attached to Ex. 2), the application was approved by the Acting Regional Forester on February 17, 1950. (See Application for Modification of Agreement, and Consent of Surety, attached to Ex. 2.) There is no mention of taxpayer in either of these modifications.

The record shows that Northwest Door corresponded with the Forest Service throughout the duration of the contract as the purchaser and owner of the Green Forks timber. (R. 102-103, Ex. A.) And the records of the Timber Management Office of the Forest Service indicate that Northwest Door was the owner and holder of the Green Forks timber contract, and that there was no recorded assignment of any kind of that right. Taxpayer is not mentioned in those records as having any right or interest in the timber contract. (R. 120-121.)

The fact that Northwest Door continuously dealt with the Forest Service as though it was the owner, and the fact that taxpayer never asserted any right consistent with a proprietary interest in himself, compels the conclusion that the logging contract accurately located legal as well as beneficial title in Northwest

Door. Compare *Hatch's Estate v. Commissioner*, 198 F. 2d 26 (C.A. 9th).

Taxpayer can derive no consolation from the definition of "logger" as found in the record of this case. He states that a logger is a man who goes into the woods, acquires timber, puts the logs on the market and sells them. (Br. 11.) It would appear from the *Carlen* case that the logger does not acquire the timber, and the record here shows that the logger does not necessarily acquire the timber. (R. 87-88.) Even where the logger is financed, it is not unusual for the lumber company to retain ownership. (R. 74, 77.) Mr. Wall testified that there are many different kinds of logging deals, but that "the logger is the fellow who in one manner or another, on one kind of a deal or another, brings the logs out." (R. 87-88.) In a letter dated October 18, 1951, from Northwest Door to the Forest Service, taxpayer was referred to as "contract logger" for Northwest Door with respect to the Green Forks timber. (R. 103.) And taxpayer himself defined "contract logging" as removing *someone else's* logs from the woods. (R. 105.)

Taxpayer states that Northwest Door acquired its logs in 1947 either by purchases in the open market or by financing the loggers. (Br. 11.) This is an inaccurate statement. Northwest Door owned stands

of timber other than the Green Forks tract and paid loggers for their services for logging or bringing the timber out. (R. 73, 74, 77.) In any event, there is nothing inconsistent with financing the logger and retaining ownership, as this case well demonstrates.

Taxpayer points out (Br. 14-15) that with regard to many of the practical matters relating to performance of the contract, such as provisions for cleanup and slash disposal, he dealt directly with the Forest Service in settling any problems that arose. But this was to be expected. Northwest Door agreed to have at least twelve men and supervisory personnel available for the burning of slash under the direction of the Forest Officer in charge. (Ex. 2, Sec. 15.) In addition, the contract is replete with provisions to safeguard the forest, which were to be regulated and supervised by the Forest Officer by direct contact with Northwest Door's representative at the logging site. (See Ex. 2, Secs. 15a, 17, 18, 19, 20, 24, 27.) The timber contract expressly specified that Northwest Door "shall have at the main camp * * * a representative who shall be authorized to receive * * * any or all notices and instructions in regard to work under this agreement given by the Forest Officer in charge." (Ex. 2, Sec. 25.) The taxpayer was Northwest Door's representative with regard to problems arising in the woods which were subject to regulation and super-

vision by the Forest Officer in charge. Any exchange of timber that may have been negotiated by taxpayer was done so in his capacity as representative for Northwest Door.

It is likewise of no moment that taxpayer may have dealt directly with the Forest Service with regard to making changes in the road (Br. 15), for under the logging contract he was to bear the expenses of constructing and maintaining all roads necessary for the removal of the timber (R. 128-129).

Taxpayer also points out that Northwest Door charged the payments made him to its log purchase account. The same was true in the *Carlen* case, and the Tax Court's handling of the matter, which was affirmed by this Court, may be deemed applicable here. Thus the charge to log purchases should be assumed "to have been for bookkeeping purposes and did not purport to evidence a sale by" the taxpayer to Northwest Door. *Carlen v. Commissioner*, 20 T.C. 573, 578.

In summary it may be said that Northwest Door was primarily concerned with assuring itself a supply of logs. After full discussion it was decided to purchase the timber and pay taxpayer to log it. He needed loans of money to finance the expenses imposed on him under the contract, namely, the cutting of the roads

and certain other expenses. This raised the problem of providing security for the repayment of the loans, and it is in this regard that Tenzler and Eisenhower spoke of the logging contract as serving as security.

It is clear that the logging contract accurately described the legal relationship of the parties to each other and the timber. Northwest Door was the "owner" of the timber; taxpayer was hired as the "logger" to cut the timber and haul the logs out, for which he was "compensated" for his "services." The parol testimony, as we have shown, is entirely consistent with the contract. There is no substance to taxpayer's claim of equitable ownership. The evidence more than substantiates the finding of the District Court (R. 23) that "Ellison had no right, title, or interest in the timber at any time." *Carlen v. Commissioner*, 220 F. 2d 338 (C.A. 9th), is controlling, and requires that taxpayer's profits be taxed as ordinary income.

CONCLUSION

For the reasons advanced above, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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APPENDIX

INTERNAL REVENUE CODE OF 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * *

(j) [as added by Sec. 151(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Sec. 127(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term “property used in the trade or business” * * * Such term also includes timber with respect to which subsection (k) (1) or (2) is applicable.

* * * *

(k) [as added by Sec. 127(a) of the Revenue Act of 1943, *supra*] *Gain or Loss Upon the Cutting of Timber.*—

(1) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer’s trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. In case such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the adjusted basis for depletion of such timber in the hands of the

taxpayer and the fair market value of such timber. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election under this paragraph such election shall apply with respect to all timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding upon the taxpayer for the taxable year for which the election is made and for all subsequent years, unless the Commissioner, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this paragraph except with the consent of the Commissioner.

(2) In the case of the disposal of timber (held for more than six months prior to such disposal) by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber, the difference between the amount received for such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber. * * *

(26 U.S.C. 1952 ed., Sec. 117.)

RULE 52 [as amended December 27, 1946]. FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment

* * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

* * * *



In the
United States Court of Appeals
For the Ninth Circuit

ROBERT F. ELLISON and
CLEO A. (ELLISON) WALKER, *Appellants*,

v.

WILLIAM E. FRANK, United States District
Director of Bureau of Internal Revenue for the
State of Washington and the Territory of
Alaska, *Appellee*.

NO. 15318

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

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APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the
Western District of Washington, Southern Division.

INTRODUCTION

The statement of the case in Appellee's Brief consists in its major portion of excerpts from selected portions of the Department of Agriculture, Forest Service agreement, (Ex. 2), the written agreement between Northwest Door Company, Vancouver Plywood and Veneer Co., and Robert F. Ellison, (Ex. 3), together with a very limited selection of portions of the testimony of certain witnesses and that part of the findings and con-

clusions of the lower Court which supported the Appellee's position in this case (Appellee's Br. 3-14).

The theory upon which this case was tried by the Appellee was that ownership of the timber on the Green Forks tract and of the contract right to cut that timber was determinable solely from two written instruments, (Ex. 2 and 3 herein), and that oral testimony was inadmissible to explain, vary, change, or construe the transaction between the parties as reflected by the writings. The defendant stated this was the theory of his case and was granted a continuing objection to the admission of any oral testimony regarding these writings (R. 36, 49). Appellant, on the other hand, insisted throughout on the admissibility and relevance of the parol testimony. The Court admitted the testimony, subject to the objection, and reserved his ruling on its admissability (R. 50).

Appellee's statement of the case is correct only if his contention that parol evidence is inadmissible can be supported; otherwise his statement is out of context with the record considered in its entirety.

SUMMARY OF APPELLEE'S ARGUMENT

The Appellee's argument is based upon three basic premises:

1. The lower Court considered the testimony of the witnesses and that the parol evidence submitted supports the Trial Court's findings (R. 22, 23).

2. Appellee implies that the Appellants' contention that the contract right to cut the timber had been assigned to him and that equitable title to the timber and the logs obtained therefrom was a sham (Appellee's Br. R. 20, 21).

3. Ellison was not the assignee of Northwest and the owner of the right to cut the timber and had no interest in the logs obtained therefrom (Appellees B. 27, 28).

SUMMARY OF APPELLANTS' REPLY

I

THE POSITION ADOPTED BY THE APPELLEE IN HIS BRIEF IS DIRECTLY CONTRARY TO THE POSITION ADOPTED BY THE APPELLEE IN THE LOWER COURT.

At the trial of the case, the Appellee announced his theory of the case to be "that title and all of the rights of the parties are established in writing and that there isn't any occasion for (the admission of) any testimony to construe" (R. 36). The Appellee stated that it was his intention to hold (the Appellants' case) very narrowly within documents and that he was going to object to any attempt to widen the issue beyond what the documents themselves contend (R. 49). The Appellee was granted an objection continuing throughout the

trial to the admission of parol evidence to alter the terms of written documents (R. 50).

A careful and thorough reading of the opinion of the trial Judge (R. 122-127), leaves the reader with the fixed impression that the Court determined the rights of Ellison solely upon the written contract between Northwest and Ellison (Ex. 3), as urged by the Appellee. That the Court did not consider the testimony of the witnesses is borne out throughout the opinion of which the following language is an example:

“Now wholly aside from the parol evidence rule, assuming for the sake of argument that all of the evidence admitted here concerning what Mr. Ellison thought about it and why they did this, that, and the other, assuming for the sake of the argument that all of that was admissible and should be taken in mind in interpreting this contract, even so I can't see how we can possibly get away from the terms of this contract (R. 123, 124).”

Having succeeded in persuading the Trial Court that he could not get away from the terms of the contract, by his insistence that the contract, and nothing but the contract, could be considered in determining the rights of the parties, the Appellee has now completely abandoned its position, and attempts to show

how the Trial Court could have reached the decision he did reach, by an entirely different route, which Appellee persuaded him he was not entitled to take.

¹ Even were Appellee's present position on the facts well-taken, the complete abandonment of his theory below is enough in and of itself to justify a new trial, in which all of the evidence, parol as well as documentary, may be considered by the trier of fact. Cf. *Landa v. Commissioner*, 206 F. 2d 431 (D. C. Cir. 1953).

Appellee invites the Court of Appeals to ignore all evidence other than Exhibits 2 and 3, but Counsel quotes liberally from such parts of the evidence, as will, when lifted out of context support his contention that the parol evidence supported the findings of the Trial Court.

At page 26 of Appellee's Brief, he quotes the testimony of Eisenhower from which the Appellee concludes that Exhibit 3 "was designed to secure Northwest Door, not for the purchase price of the timber, but only for the repayment of the loans amounting to \$100,000.00, which taxpayer *was* legally obligated to pay." At that point, an additional question is presented:

¹ Appellee, even at this point, does not straightforwardly confess his error and admit outright that his position below was unsound, but rather backhandedly concedes the fact by stating that "it may possibly be" (Br. 22) that taxpayer is right, referring to the cases that so hold, and then making no attempt whatsoever to deny their applicability. He then goes on to discuss at great length the parol evidence, which the Court did not consider, as affording a basis for the result which the Court reached on entirely different and erroneous grounds.

a. If Mr. Eisenhower meant only to say that the contract was to secure Northwest for cash advances, why did he also say. “. . . and secondly, to see that Mr. Ellison delivered to Northwest Door the logs which Northwest Door wanted to use in its plywood plant” (R. 56).²

Appellee argues (pages 26, 27) that the security feature of the contract was only to secure repayment of cash advanced, not delivery of logs, quoting Mr. Eisenhower’s testimony (R. 56) as authority for this conclusion.

Apparently, Appellee at this point completely capitulates, not only on the admissibility of the parol evidence, but also on the fact that the Appellant has conclusively established that the so-called “employment contract” (See Defendant’s Contentions R. 16) is in reality a security device. What was secured, however, was clearly stated by both Eisenhower and Tenzler to be the return of the money to be advanced and a supply of logs (R. 38, 52, 56). Eisenhower also referred (in the portion of his statement omitted from quotation at page 26 in Appellee’s Brief) to Vancouver Plywood as another party who was “going to advance the necessary

² Compare this with Tenzler’s testimony (R. 37) that Northwest could only use a certain grade of log, “peelers”, in its plywood plant. Note the balance of Eisenhower’s testimony (R. 56) that he received those instructions *before* the bid date, and that Ellison wanted not only to log the timber, but to *sell* the logs to Northwest (R. 60).

funds needed by him (Ellison) to purchase this timber and log it" (R. 56).

Appellee in quoting Eisenhower omits that portion of Mr. Eisenhower's testimony (quoted on page 26 of his brief) in which the witness explained the objectives he intended to accomplish when drafting the contract, Ex. 3. The testimony of the witness regarding Ellison's purpose in entering into the contract with Northwest continued:

"A. He wanted to acquire certain timber to log and he needed financing to help do it and he came to Northwest Door to acquire that financing.

Q. And what he wanted to do was to log it, let's be precise about that.

A. He was in the logging business and he . . .

Q. He wanted to log this timber, is that right?

A. Yes, and sell us the logs."

Appellee ignores all of the testimony of Eisenhower and Tenzler other than the brief extracts quoted at page 26 and reaches the conclusion that, "The contract (Ex. 3) means what it says". The overall testimony of Tenzler and Eisenhower was that the objective of the contract (Ex. 3) was to secure Northwest in the event of a default.. This does not mean that the contract drawn by Eisenhower purported to describe the rights

of the parties for all purposes and it is perfectly clear from the testimony of the witnesses that it did not.

The Appellee asserts (Appellee's Br. 32) that a logger can never be a merchant, and that regardless of what the persons engaged in the logging industry may consider their occupation to be, *Carlen v. Commissioner*, 20 T. C. 573; *affd. Carlen v. Commissioner*, 220 F.2d 338 (9th Cir. 1955) have settled as a matter of law that anyone who calls himself a logger must be an employee. He misquotes Theodore Wall's definition of a logger (R. 87):

"A logger is a man who goes out into the woods and acquires the timber and he builds his road and if he has got an engineering problem he solves the whole thing, puts the logs into the market. That is what I term a logger."

and overlooks the Court's finding (R. 25):

"14. During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self-employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest."

Appellee continues by making the wholly erroneous assertion that there was no liability on the part of taxpayer to Northwest to reimburse it for logs cut but not delivered (Br. 25).

The agreement between Ellison and Northwest contained express provision that he would keep and save harmless the Northwest Door Company from any and all claims, demands, or liabilities of the United States Department of Agriculture (Ex. 3, Par. 4). This obviously includes any liabilities which Northwest might incur by reason of cutting timber belonging to the Forest Service. If Ellison failed to deliver such logs, he was nevertheless liable to Northwest on his contract for the purchase price.

Appellee asks the Court to consider an example of Ellison's position in the event that a load of logs were lost and concludes that taxpayer had no legal obligation to pay for the stumpage (Appellee's Br. 25). When questioned on this very point H. G. Reinsch testified (R. 91):

"Q. Now state whether or not there was any agreement with Mr. Ellison for the absorption of any loss to logs that might occur before they were delivered into the custody of Northwest Door Company.

A. Well, any loss that took place was too bad for Mr. Ellison.

Q. What do you mean by that, Mr. Reinsch?

A. He would be the loser.

The Court: You mean you were only going to pay him for the logs he got to the dump?

The Witness: Logs delivered to our points.

The Court: To your delivery points?

The Witness: Yes."

The Appellee apparently considers that this testimony meant that Ellison would lose only the amount due for what the Appellee terms compensation. In view of Ellison's contract to reimburse Northwest for any liability to the Forest Service, it is difficult to understand Appellee's contention that Ellison would not be compelled to pay Northwest for stumpage on any logs lost.

In this connection, it should be noted that Appellee, (in footnote 6, p. 25), erroneously states that the timber was paid for before the logs were cut. From examination of the contract with the Forest Service, it is apparent that what was required was a deposit in advance, similar to payment of the last month's rent, but that each load of logs was paid for as scaled, which could obviously not be done until the trees were cut and removed to the scaling points. See Ex. 2, §§ 2 (b), 6, 6 (a) 11; 36 CFR 221.13.

Not only does the Appellee quote the witnesses out of context; certain portions of the evidence are misinterpreted. For example, on page 29 of Appellee's Brief, a portion of Exhibit 7 is quoted:

“As you know, on the Green Forks timber neither of us will make any gain or loss on the logs, as the contract has been turned over to Ellison. All we will receive are logs at current market prices.”

Counsel says “All that Mr. Raknes (the author of the exhibit) meant was that inasmuch as taxpayer was receiving market price . . . for his services, Northwest Door would not make a profit on the logging operations.” Counsel assumes that Mr. Raknes attached no meaning to the words “as the contract has been turned over to Ellison”.

Counsel for Appellee contends that this memorandum, (Ex. 7), indicates that Northwest was considering transferring the Green Forks tract to Vancouver Plywood; this is not correct. From a cursory reading of the memorandum, it is apparent that Northwest desired to sell logs to Vancouver from timber owned by Northwest adjacent to Vancouver's holdings in exchange for the logs to be obtained from the Green Forks tract by Ellison and delivered to Northwest. It is interesting to note that on the tract owned by Northwest from which logs were offered to Vancouver, Northwest intended to employ a logger at a flat rate per thousand feet of logs. Also note that Northwest maintained two sets of logging accounts upon its records; one for the entry of the costs of loggers performing services, (R. 78), the other

for the costs of logs purchased, to which accounts, the logs acquired from Ellison were charged (R. 78).

The Appellee cites certain correspondence between Northwest and the Forest Service as proof of Northwest's ownership. The Appellant does not deny that so long as Northwest remained on the bond with the Forest Service, the company's relationship was that of a guarantor. Appellee ignores the explanation of the witnesses regarding the purpose of the correspondence between Northwest and the Forest Service (Ex. A). The correspondence is fully explained as routine correspondence about which H. G. Reinsch (principal log buyer for Northwest at that time) would not necessarily have knowledge (R. 98). The testimony further shows in explanation, that it was written by Roy Ausserer regarding matters which were fully explained as relating to records maintained by Northwest because the company had sufficient personnel to perform the work.

Appellee having convinced the Lower Court that parol evidence was not admissible, now changes his position and suggests for consideration by this Court only such portions of the testimony as may, out of context, support his theory of the case. This proposal is inconsistent with the submission of the case to the Lower Court.

THE APPELLEE URGES THAT THE TAXPAYER MAY UNDER CERTAIN CIRCUMSTANCES IMPEACH A CONTRACT TO WHICH HE IS A PARTY, THE TAX COLLECTOR MAY AT HIS OPTION REJECT OR SUSTAIN THE TAXPAYER'S CONTENTIONS, BUT DOES NOT CLAIM THAT THIS RULE APPLIES TO THE INSTANT CASE.

For reasons which he fails to explain, Appellee cites cases relating to "sham" or "unreal" transactions, and asserts that the Commissioner is entitled to elect whether to sustain or disregard such arrangements. He does not appear to contend that this rule is any way applicable to the instant case, as it clearly is not. There is nothing "fictional" about the contract herein involved. It was a very real arrangement, entered into by the parties for security purposes, to protect the lender in the event of a default which fortunately never took place. The rights of the parties were carefully defined to see to it that Northwest would be damaged as little as possible if such a default occurred. To suggest that such an arrangement is "fictional" is to ignore both the evidence in the case and the practice of businessmen in handling security transactions since time immemorial. It is not apparent from Appellee's brief why this issue was raised. Since Appellee does nothing more

than mention the rule without attempting to claim that it is applicable herein, no further discussion of this point appears necessary.

III

THERE WAS A VALID ASSIGNMENT OF THE FOREST SERVICE CONTRACT TO ELLISON TO WHICH THE STATUTE OF FRAUDS DID NOT APPLY.

There is a basic misconception underlying much of the Appellee's argument. This misconception is that the Department of Agriculture contract is a conveyance of standing timber. Granting for the sake of argument that the Appellee is correct in his belief, the inhibition against assignment cannot be urged by the Tax Collector because:

(a) An oral contract unenforceable under the statute, is perfectly valid as between a party thereto and a third person. Corbin, Contracts, Vol. 2, § 289.

(b) The transaction between the Department of Agriculture, Northwest and Ellison was completely performed, and thus removed from the statute. Corbin, Contracts, Vol. 2, § 279 at page 22.

The point which Appellee fails to realize is that Northwest never had any legal title to the timber included in the Forest Service contract which it could

convey or sell. All that Northwest had was a contract right to cut the timber subject to the contract which it could and did assign.

Where there is an oral assignment of a contract which is recognized by the parties and the principal treats the assignee as the party in interest, the assignment is valid as against any third party including the Commissioner of Internal Revenue. *Paxson v. Commissioner of Internal Revenue*, (CA 3) 144 F.2d 772 (1944); *The Hub, Inc.*, 3 B. T. A. 1259 (1925); *Independent Aetna Sprinkler Co.*, 16 B. T. A. 521 (1929).

Appellee overlooks the uncontradicted testimony of all the witnesses in this case, none of whom with the exception of the Appellant himself, had any interest in the outcome of this proceeding. This testimony was that all parties treated Ellison as the owner of the contract right to cut the timber and of the logs obtained from the tract, which is in fact what he was.

Ellison agreed with Theodore Wall regarding the amount he would pay for the timber (R. 84, 85), and Northwest agreed to advance the funds needed by Ellison to purchase and harvest the timber (R. 56). When Northwest purchased the timber a resulting trust arose which is expressly excluded from the Statute of Frauds.

McSorley v. Bullock, 62 Wash. 140, 113 Pac. 279 (1911); Corbin, Contracts, Vol. 6, § 1461; Scott, Trusts (2d. Ed) § 448.

In his argument, Appellee ignores testimony of the witnesses that Ellison negotiated directly with the Forest Service regarding changes in the subject matter of the contract without consultation with Northwest. The contract (Ex. 2) provides for the cutting of timber on certain specified tracts (Ex. 2 § 1). The uncontradicted testimony in this case is that Ellison negotiated a substitution of other timber for that specified in the contract without prior approval of Northwest (R. 101, 110, 111).

The Forest Service contract also specifies that the main roads shall be located as designated on a map made part of the contract and where staked in advance by the Forest Service or approved in advance by the Forest Service Supervisor (Ex. 2, § 29). However, Ellison negotiated a change in the course of the main road directly with the Forest Service without discussion or prior approval of Northwest. The change in the location of the main roads also represents the act of a principal dealing for himself rather than a mere compliance by Ellison with the terms of his agreement "to bear the expenses of constructing and maintaining all roads

necessary for the removal of the timber” as the Appellee contend (Appellee’s Br. 34).

The Appellee relies upon the provisions of the Forest Service contract relating to the placing of a duty upon Northwest for the protection of the Forest Service (Ex. 2). These sections relate to day-to-day performance of the contract:

15. Purchaser agrees to have at least twelve men and supervisory personnel available to Forest Officer in charge for the burning of slash. The testimony in this case is quite clear that the responsibility for fire control and the burning of slash as well as the requirements of the State relating to cleanup, was solely that of Ellison (R. 94, 95, 96).

He also refers to the following sections relating to day to day performance of the contract as indicative of the matters decided by the Forest Service in direct contact with the representative of Northwest:

- 15 (a) Construction of fire lines.
- 17. Assistance in fighting fires.
- 18. Smoking and lunch fire restrictions.
- 19. Burning of refuse.
- 20. Fire prevention.
- 24. Employment of fire foremen.
- 27. Keeping camps in a sanitary condition.

35. Shall have at main camp a representative authorized to receive any and all notices and instructions in regard to work.

The above listed conditions were the responsibility of Ellison who performed them (R. 92, 94, 95).

The Appellee urges that if Ellison's interest in the contract right to cut were primary and that of Northwest only for security purposes, Northwest would have sold Ellison the timber on a conditional sales contract, or transferred the timber to him and taken a mortgage back (page 29). As Appellee states on pages 6 and 19 of his brief, title to the timber was at all times in the United States until it was paid for (Ex. 2, §§ 2, 6, 11). Under the terms of this contract, it would have been impossible for anyone but the Department of Agriculture to sell the standing timber on a conditional sales contract or outright, taking a mortgage in return. He further overlooks that, under the arrangements drafted by Mr. Eisenhower, Northwest was amply secured. Appellee's footnote 8 is completely erroneous, Appellant never suggested that Eisenhower contemplated a mortgage on the timber, but a "loan on Ellison's equipment" (Appellants' Br. 14) or a chattel mortgage (Appellants' Br. 19).

Appellee states (Appellees Br. 27) that the fact that Northwest wanted to assure itself a supply of logs was

inconsistent with the transferring of ownership to the taxpayer, because in the event of a dispute taxpayer might have withheld the logs. This, of course, is precisely why the contract was drawn in the manner it was: So that in the event of a dispute taxpayer could not withhold the logs. This is exactly what Eisenhower meant when he said that he drew the instrument with the design of securing the supply of logs (R. 52). It is evident that if Northwest owned the logs, it would not have had to secure their supply by this instrument.

Appellee further argues that Ellison, as a prudent business man, would have obtained some written memorandum evidencing his primary ownership of the contract right to cut if it were really intended that ownership be transferred to him (Appellees Br. 28). It is elementary that a debtor does not dictate the terms under which credit is extended to him. He also overlooks what was demonstrated by the way in which this transaction was ultimately concluded . . . that both Ellison and Northwest were honorable business firms and trusted one another, and that their mutual trust and confidence was apparently well placed. If the fact that their transaction was not completely integrated in writing was good enough for them, it should be good enough for the Commissioner. No existing state or federal law prohibits citizens from keeping their bargain when not

reduced to writing. Even, if under the Statute of Frauds, an oral contract is valid as between a party thereto and a third person.

Appellee urges that the Appellant "will certainly have to prove beyond question that the contract (Ex. 3) was intended as something entirely different from what it purports to be. This statement is based upon two misconceptions:

(a) A misunderstanding of the rules governing burden of proof.

(b) The Court must consider the contract in a vacuum without reference to extrinsic evidence or testimony.

Neither the Congress, the Legislature of Washington, nor the evolving common law, has adopted the rule urged by the Appellee, that in civil cases (even against the sovereign) a plaintiff carries the same burden of proof carried by the sovereign in a criminal case; namely that of proof beyond a reasonable doubt.

The evidence in this case is uncontradicted that the Forest Service dealt directly with Ellison in matters relating to the substance of the contract. Northwest Door Co. consistently recognized that Ellison was the beneficial owner of the contract right to cut the timber,

and in carrying out the transaction at all times treated Ellison as the owner.

Exhibits 2, 3, and the balance of the agreement between the parties as adduced at the trial must be considered in *pari materia*. When this is done, it is quite apparent that Exhibit 3 represents only one part of the entire transaction, and is only an instrument in the nature of a bipartite trust receipt to provide security *it never became necessary to utilize*.

CONCLUSION

Appellants' position is fully stated in their opening brief, and need not be restated here. Appellee has apparently accepted our basic premise that the contract may not be construed in vacue, but must be considered with reference to the purposes which it was designed to accomplish. The abandonment of his theory below, on the basis of which the Trial Court was led to decide in his favor is sufficient in itself to justify the reversal of this case for a consideration of all of the relevant evidence. It should be apparent that having persuaded the Trial Court to disregard all of the parol testimony, the Appellee cannot prevail here on the basis that there is some parol testimony in the record that supports his theory.

All of the evidence in the record supports the assignment by Northwest to Ellison of the contract right to cut the timber and is consistent with the position that Ellison had equitable title to the logs, and only with that position. The unqualified and uncontradicted testimony of reputable and disinterested witnesses should be accepted by this Court. We submit that there can be no other conclusion from all of the evidence than that the judgment of the Court below should be reversed with directions to enter judgment in favor of taxpayer.

Respectfully submitted,

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APPENDIX**CODE OF FEDERAL REGULATIONS****Title 36 — Parks and Forests**

Regulations relating to the protection, occupancy, use and administration of the National Forests — Secretary of Agriculture August 12, 1936, 1 F. R. 1092-1095.

36 § 221.13 Payments in advance of Cutting, Refunds and Transfers.

No timber shall be cut under any sale contract until it has been paid for. Refunds may, in the discretion of the Chief of the Forest Service or Regional Forester, be made to depositors or to their legal representatives of sums deposited in excess of amounts due the United States. Refunds of payments may also be made to the rightful claimants of sums erroneously collected for timber or other forest products. (34 Stat. 1270, 36 Stat. 1253; 16 U.S.C. 499 (Reg. S-13). ~~1949 Amendment.~~





